

CLERK'S COPY

Supreme Court of the United States

JOHN FALCO, PETITIONER

THE UNITED STATES OF AMERICA

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

PRISONER FOR DEBTORSHIP FILED MAY 21, 1942

RECEIVED GRANTED JUNE 2, 1942

**IN THE UNITED STATES CIRCUIT
COURT OF APPEALS**

For the Third Circuit

No. 8233

United States of America

v.

Nick Falbo

Appellant

**Appeal from a judgment in the District Court of the
United States for the Western District
of Pennsylvania.**

APPENDIX FOR APPELLANT

**P. K. JONES,
235 Broad Bldg.,
New Kensington, Pa.**

**VICTOR F. SCHMIDT,
Pine Road,
Rossmoyné, Ohio.
Attorneys for Appellant.**

INDEX OF APPENDIX

| | PAGE |
|-------------------------|------|
| Docket Entries | 1 a |
| Plea in Abatement | 3 a |
| Motion to Dismiss | 6 a |

Trial Record

| | |
|--|-----|
| Convening of Court and Appearances | 8 a |
|--|-----|

CASE FOR GOVERNMENT:

| | Direct Exam. Pages | Cross Exam. Pages |
|--------------------------------|-----------------------|----------------------|
| Van Kirk, Mrs. Katherine | 9 a | 15 a |
| Allison, Herbert M. | 20 a | 22 a |

CASE FOR DEFENDANT:

| | | |
|--|------|------|
| Falbo, Nick | 23 a | 33 a |
| Falbo, Nick (recalled) | 36 a | |
| Galuppo, Angelo | 34 a | |
| Oral Charge to the Jury | | 40 a |
| Statement of Defendant before Sentence | | 43 a |
| Certification of Official Reporter | | 49 a |
| Certification of Trial Judge | | 49 a |

EXHIBITS

| | PAGE |
|--|--|
| Govt's Exhibit No. 1, Registration Card | 50 a |
| Govt's Exhibit No. 2, Selective Service Questionnaire | 51 a, 52 a, 53 a, 54 a 55 a, 56 a, 57 a, 58 a |
| Govt's Exhibit No. 3, Order to Report | 59 a, 60 a |
| Deft's Ex. "A", Notice of Delinquency | 61 a |
| Deft's Ex. "B", Reply to Notice of Delinquency .. | 62 a |
| Deft's Ex. "C", Conscientious Objector's Form | 63 a, 64 a, 65 a, 66 a |
| Deft's Ex. "C"; Authorization Certificate | 67 a |
| Deft's Ex. "C", Reverse Side of Authorization Certificate | 68 a |
| Deft's Ex. "C", "My Statement" | 69 a, 70 a |
| Deft's Ex. "D", Certificate of Ordination | 71 a |
| Deft's Ex. "E", Letter of Appellant | 72 a |
| Deft's Ex. "F", Affidavit of John A. Poloney | 73 a |
| Deft's Ex. "G", List of Signators | 74 a |
| Deft's Ex. "G", Affidavit of Galuppo | 75 a |
| Deft's Ex. "H", Statement of De Fazio | 76 a |
| Deft's Ex. "I", Letter of Watchtower Society .. | 77 a |
| Deft's Ex. "J", Affidavit of Appellant | 78 a, 79 a |
| Verdict of Jury | 80 a |
| Judgment and Commitment | 80 a |

INDEX OF ADDITIONAL PORTIONS OF RECORD

| | Page |
|--|------|
| Indictment | 82 |
| Plea and waiver of counsel | 83 |
| Notice of appeal to Circuit Court of Appeals | 83 |
| Assignments of error | 85 |
| Proceedings in U. S. C. C. A., Third Circuit | 99 |
| Minute entry of hearing | 99 |
| Opinion, per curiam | 100 |
| Judgment | 100 |
| Clerk's certificate | 101 |
| Stipulation as to record | 102 |
| Order allowing certiorari | 103 |

Docket Entries

| | | | |
|------|-----|------|--|
| Nov. | 12, | 1942 | True Bill. |
| " | 12, | " | Indictment filed. |
| " | 7, | " | Petition and order for subpoena duces tecum filed. |
| " | 7, | " | Subpoena duces tecum issued. |
| " | 19, | " | Petition and order for subpoena duces tecum filed. |
| " | 19, | " | Subpoena duces tecum issued. |
| Dec. | 1, | " | Plea in abatement filed and order of court entered overruling same. |
| " | 1, | " | Defendant pleads not guilty. |
| " | 1, | " | Trial opens at 2:17 P. M. before Schoonmaker, Judge. |
| " | 1, | " | Motion to dismiss filed and order of court entered thereon denying same. |
| " | 1, | " | Trial concluded at 3:46 P. M. |
| " | 1, | " | Trial memo filed. |
| Dec. | 1, | " | The jury find defendant guilty—verdict filed: |
| " | 1, | " | The sentence of the court is that defendant be placed in the custody of the Attorney General for five years—no fine or costs. (S) counsel. |
| " | 1, | " | Temporary commitment issued. |
| " | 1, | " | Final Commitment issued. |
| " | 2, | " | Temporary commitment returned executed. |

" 4, " Notice of appeal to Circuit Court filed by defendant, with acceptance of service thereon.

" 28, " Final commitment returned executed.

Jan. 2, 1943. On motion of defendant-appellant, order of court entered extending time to February 10, 1943 in which to file and docket record on appeal.

Feb. 5, " Motion for extension of time for filing and docketing record on appeal filed.

" 5, " Affidavit on motion for extension of time on appeal filed.

" 5, " Order of court filed and entered extending time to March 3, 1943 in which to file and docket record on appeal.

Mar. 2, " Stipulation in re Record filed.

" 2, " Transcript of testimony filed by leave of Court.

" 2, " Assignments of Error filed.

" 2, " Designation of Contents of Record on Appeal filed.

Plea in Abatement

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, ss:

Now comes NICK FALBO, the defendant in the above-entitled cause of action, and being duly sworn herewith presents his Plea in Abatement on facts extrinsic to the Indictment and record thus far in this case:

- I. The defendant says that he has been a regular minister of religion since 1931 and a "duly ordained minister" since Sept. 1, 1940 and this fact was made known to the Local Board at the time of filling out his questionnaire and also presented in his conscientious objector's affidavit. The Local Board, therefore, had no authorization to issue the order to report for work of national importance in a conscientious objectors' camp when Title 50 U. S. C. A. 305 (d) exempts from training and service (but not from registration) a regular or duly ordained minister of religion, which the defendant asserted himself to be at all times in the matters pertaining to this case.
- II. The Court lacks jurisdiction by reason of the fact that the defendant had valid reasons for having failed to perform the duty required of him under the Selective Service System, to-wit:
 - (a) The Local Board in its administration failed to take necessary steps and violated Section 623.1 (c) of the Selective Service Regulations whereby the Defendant was wrongly classified and ordered to report,—and any judgment of this Court predicated upon such

unwarranted jurisdiction and whereby the Defendant would be deprived of his liberty is contrary to the First, Fifth, and Thirteenth Amendments to the United States Constitution.

(b) The jurisdictional basis of the present procedure as the evidence is predicated upon the acts and procedure of the Local Board which acted unfairly, arbitrarily and discriminatorily and capriciously in violation of the rights of and to the prejudice of the Defendant, contrary to Section 623.1 (c) of the Selective Service Regulations.

(c) The jurisdiction of this Court is based upon the procedure taken by the Local Board which has violated and omitted material steps prior to the order to report and contrary to the rules and regulations of the Selective Service System, and particularly Section 601.5 thereof.

The Defendant prays that the indictment be quashed.

The Defendant reserves exception to any adverse ruling hereon.

NICK FALBO.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, ss:

The Defendant being duly sworn states that the above facts are true to his personal knowledge except those based upon information and belief and as to them he has reason to believe they are true.

NICK FALBO

Sworn and subscribed before me this 1st day of December, 1942.

(SEAL)

I. C. STAUER,
U. S. Deputy Clerk.

Authorities

Application of Greenberg, 39 Fed. Supp. 13.

St. Joseph Stock Yards Co., v. U. S., 298 U. S. 38, at 49 to 54.

Interstate Commerce Comm., v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91.

U. S. A. v. Raise (1942), U. S. Circuit Court of Appeals for the Sixth Circuit.

Ver Mehren v. Sermyer, Commandant, etc., 36 Fed. 2d 976.

Ex parte Green, 123 Fed. 2d 862.

U. S. v. Nevin, 199 Fed. 831.

U. S. v. Greene, 113 Fed. 683.

U. S. v. Hammond, 26 Fed. Cases, No. 15,294.

Now December 1, 1942, Plea overruled.

Per Curiam

F. P. SCHOONMAKER,
Judge.

Motion To Dismiss

Comes now the defendant in the above entitled case and moves the Court for an instructed verdict to dismiss the defendant for the following reasons:

- (1) The trial court does not have jurisdiction of the subject matter involved in this case because the order for induction by the Local Board under the Selective Service System was irregular and without authority in the instant case since regular or duly ordained ministers are exempt from induction according to Title 50 U. S. C. A. 305 (d) and such action of said Local Board was unfair and arbitrary as disclosed upon the record,—all of which is contrary to the First, Fifth, and Thirteenth Amendments to the United States Constitution.
- (2) The evidence is insufficient to constitute a crime under the laws of the United States, because the uncontradicted evidence shows that the defendant at all times since his registration under the Selective Service Act to the present time has been a regular and a duly ordained minister of religion and the Local Board was unfair, arbitrary and discriminatory in the administration of the law contrary to Section 623.1 (c) of the Selective Service Regulations.
- (3) The defendant is protected from the charge named in the indictment by specific exemptions stated in the law under which he is held, namely: Title 50, U. S. C. A. 305 (d) exempts from training and service (but not from registration) regular or

duly ordained minister of religion. Furthermore, the application of the Selective Service Act according to Section 601.5 of the Selective Service Regulations, protects the defendant from performing the duty charged in the indictment because he had a valid reason for having failed to perform said duty under the regulations.

The defendant reserves exception to any adverse ruling hereon.

(Signed) VICTOR F. SCHMIDT,
Attorney for Defendant.

Address: Pine Road,
Rossmoyne, Ohio

December 1, 1942, Motion denied

Per Curiam

F. P. Schoonmaker, Judge

TRIAL RECORD

And now, Tuesday, December 1, 1942, at 2:10 o'clock P. M., the above entitled cause came on for trial before Hon. F. P. Schoonmaker, Judge, and a Jury, at Pittsburgh, Pennsylvania.

COUNSEL PRESENT:

For the Government: George Mashank, Esq.,
Assistant U. S. Attorney.

For the Defendant: Victor F. Schmidt, Esq.,
(Rossmoynne, Ohio).

Transcript of Official Notes of Testimony

Reported by
Harriet Cole Thomas,
Official Reporter.

MR. SCHMIDT: The defendant at this time will present a plea in abatement. (Written plea presented).

THE COURT: Have you seen this plea, Mr. Mashank?

MR. MASHANK: Yes, I have a copy of it, Your Honor. And I feel it ought to be dismissed, for the reason the facts set forth here are not properly raised. It is not a matter for this Court to determine. There is a procedure provided for the remedy he is asking for, under that case in the Circuit Court of Appeals.

THE COURT: Do you admit the facts set out in this plea in abatement?

MR. MASHANK: No, Your Honor, we do not admit the facts.

THE COURT: The only fact that I see is his assertion that he is a regular minister of religion.

MR. MASHANK: And that is the fact that we do not admit. We say that matter has already been passed upon by the proper tribunal.

THE COURT: It is our view that the subject matter raised in this plea of abatement is a matter that should be raised before the regularly established Draft Board, and that the Board has the decision of whether or not this man is to be listed as he claims he should be. We therefore deny this plea in abatement.

MR. SCHMIDT: The defendant respectfully excepts to the ruling of the Court.

MR. SCHMIDT: At this time the defendant enters his plea of not guilty, as subscribed to the indictment.

(Jury sworn).

(Mr. Mashank opens to the jury for the Government).

KATHERINE VAN KIRK, a witness produced on behalf of the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MASHANK:

Q. Will you state your full name, please?

A. My name is Mrs. Katherine K. Van Kirk.

Q. Where do you live, Mrs. Van Kirk?

A. In West Newton, Pennsylvania.

Q. Are you employed?

A. I am employed.

Q. In what capacity, and by whom?

A. As a clerk for the Federal Government Selective Service Board, Draft Board 11, Westmoreland County, Pennsylvania.

Q. And, as such clerk, do you have custody of all records of the Board pertaining to registrants that have been registered and are under the jurisdiction of Local Board No. 11?

A. That is right.

Q. You are familiar with all the documents and records, and so forth?

A. Yes, sir.

Q. Now, do you have the file of Nick Falbo, the defendant in this case, with you?

A. I do.

Q. State whether or not in that file there is a questionnaire of the defendant's?

A. There is.

Q. Will you produce it?

A. (Witness hands papers to counsel).

(Three papers marked respectively Government Exhibits Nos. 1, 2 and 3).

Q. I show you Government Exhibit No. 1. Will you please identify it and tell us what it is?

A. This is the Board's registration card which was filled out by Nick Falbo, defendant, when he registered at our Board.

Q. And when did he register?

A. October 16, 1940.

Q. And that is a record of your Board?

A. That is right.

MR. MASHANK: I offer in evidence Government Exhibit No. 1.

MR. SCHMIDT: No objection.

Q. I show you Government Exhibit No. 2. Will you tell us what that is?

A. This is the Selective Service questionnaire of Nick Falbo, defendant, that was issued August 13, 1941, and presented to him to give the data concerning himself requested of each registrant.

Q. And that paper was executed by the defendant and returned to your Board?

A. On the 23d of August, 1941.

Q. And that is a record of your Board?

A. That is right.

Q. And after that questionnaire was returned to your Board, what action with reference to classification was taken by the Local Board?

A. This registrant was classified in Tentative 1 on August 25, 1941—

THE COURT:

Q. What date is that?

A. September,—no; it is "8"—September 25, 1941.

MR. MASHANK:

Q. He was placed in Tentative Class 1?

A. That is right.

Q. And was he later placed in a final classification?

A. He appealed the Tentative 1 on January 26, 1942, before he was placed in 1-A.

- Q. And what action, if any, was taken by the Appeal Board, do you know?
- A. The Appeal Board classified him in 1-A by a vote of 4 to nothing.
- Q. And what was the next step that was taken by the defendant?
- A. He again submitted evidence, and it was again returned to the Appeal Board—
- Q. He submitted evidence to whom?
- A. To the Appeal Board, and asked for a return of his folder.
- Q. And based on that additional evidence, was he classified?
- A. He was classified on June 17, 1942, on Class 4, subdivision "E", by the Appeal Board by a vote of 4 to nothing.
- Q. And what is the Classification 4-E? For whom is that provided?
- A. For those registrants who are conscientious objectors and who do not see fit to go to war or to battle, as an objector.
- Q. So the defendant in this case, Nick Falbo, was placed in classification 4-E, conscientious objector?
- A. That is right.
- Q. And what, if anything, was done by the Board or representative of the Board after that classification was assigned to the defendant?
- A. Well, of course, the Local Board concurred in the decision of the Appeal Board and classified him in 4-E, as the Appeal Board had done, and so notified the State Department.

Q. The State Selective Service Director?

A. That is right.

Q. Now, after you notified the Director of Selective Service—that is, the State Director—did the State Director send you any document or paper of directions with reference to the defendant?

A. He sent us an order as to the place to which this boy was to be sent for work of national importance.

Q. And did you notify the defendant of that fact?

A. We did.

Q. Did you send him some kind of a notice or paper?

A. We sent him DSS Form 50.

Q. Show you Government Exhibit No. 3, and ask you if that is a copy of the notice that you sent to the defendant.

A. It is.

Q. You say the original of that was sent to the defendant?

A. That is right.

MR. MASHANK: I offer in evidence Government Exhibit No. 3. I believe I offered the questionnaire, Government Exhibit No. 2, in evidence. If not, I make the offer at this time.

Q. Will you please read Government Exhibit No. 3?

A. (Reading):

"Order To Report For Work of National Importance**"The President of the United States****"To Nick Falbo****Home address 327 Hill St., North Belle Vernon, Pa.****Order No. 2510****"Greeting:**

"Having submitted yourself to a Local Board composed of your neighbors and having been classified under the provisions of the Selective Training and Service Act of 1940 as a conscientious objector to both combatant and noncombatant military service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Civilian Public Service Camp No. 46, located at Big Flats, Chemung County, in the State of New York.

"The Selective Service System will furnish you transportation to the camp, provided you first go to your Local Board named above and obtain the proper instructions and papers.

"You will therefore report to the Local Board named above at 4 P. M. on the 2d day of September, 1942.

"You will be examined at the camp for communicable diseases and you will then be instructed as to your duties.

"Willful failure to report promptly to this Local Board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940 and may subject you to a fine and imprisonment.

"You must keep this form and take it with you when you report to your Local Board.

**"(Signed) JAMES M. WHITE,
Member of Local Board."**

Q. Was the Board prepared to provide transportation tickets and meal tickets and other incidentals for this man's entrainment, that is, for the defendant's entrainment for a work camp?

A. They were both ready, yes, sir.

Q. And did the defendant, pursuant to that notice, call at the Board's office to pick up the tickets, transportation and meal tickets, and so forth?

A. He did not.

Q. And did he appear at the office of the Board or any other place, as far as you know, pursuant to that notice, for the purpose of entrainment to go to and perform work of national importance?

A. He did not.

Q. Up to this time he has not?

A. He has not.

CROSS EXAMINATION

MR. SCHMIDT:

Q. Mrs. Van Kirk, after you sent out the order to report for work of national importance at civilian training camp, that was followed by a notice to the registrant of suspected delinquency, was it not?

A. Yes, it was.

Q. Have you that in your file, please?

A. You mean the original one, that was sent to him?

Q. Well, you have the copy of that in the file?

A. That is right (producing paper).

(Said paper marked Defendant's Exhibit "A").

Q. And on this notice to registrant of suspected delinquency, will you kindly read the body of the letter, please?

A. "To Nick Falbo. Dear Sir: According to information in possession of this Local Board, you have failed to perform the duty or duties imposed upon you under the Selective Service Law as specified below:

"(1) To present yourself for and submit to registration . . ."

which, of course, was not marked with an "X"; it did not apply to the defendant.

"(2) . . ."

a blank line to specify the actual delinquency that was committed, and we have marked that with an "X", to present himself for work of national importance.

"You are therefore directed to report by mail, telegraph or in person, at your own expense, to this Local Board on or before 5:00 P. M. on the 8th day of September, 1942. Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment or both."

Q. Now, in response to all of that, did you not on September 8, 1942, receive a letter signed by the registrant, Nick Falbo?

A. We did.

(Paper marked Defendant's Exhibit "B").

Q. Will you kindly read Defendant's Exhibit "B" to the jury?

MR. MASHANK: Just a moment. That is objected to, for the reason it has not been admitted in evidence.

MR. SCHMIDT: I will withdraw that last question.

Q. Now, Government's Exhibit No. 2, and being a part of the questionnaire, will you kindly read to the jury section 1 and 2 of that?

A. Of Section VIII?

Q. That is right.

A. The instructions for this Section VIII are to "Minister, or Student Preparing for the Ministry. INSTRUCTIONS.—Every registrant who is a minister or a student preparing for the ministry shall fill in the statements in this series that apply to him.

"1. (a) I am a minister of religion.
(am) (am not)

(b) I do customarily serve as a minister.
(do) (do not)

"(c) I have been a minister of the Watch Tower
Name of Sect

Bible & Tract Society since 7/1/30"

(or denomination)

(Month, day, year)

since July 1, 1930.

"(d) I have been formally ordained. If
(have) (have not)

so, my ordination was performed on

7/1/30 by the Watch Tower Bible

(Month, day, year)

(Ecclesiastical official perform-

& Tract Society at Belle Vernon, Pa.

(ing the ordination)

(City and State)

"3. I am not a student preparing for the
(am) (am not)
ministry in a theological or divinity school.

"4. I am attending the
(Name of theological or divinity
school) and that space was left blank.

"which was established
(before) (after)

"... also blank—

"September 16, 1939, and is located at
(Place) which is also blank. The last

section (b), under part II, is not filled in.

Q. I ask you what this is (handing paper to witness)?

A. This is DSS Form 47, filled out by Nick Falbo, the special form for conscientious objectors.

(Said paper marked Defendant's Exhibit "C").

Q. Now, when Mr. Falbo sent up his appeal, or appealed his first classification, what did he ask for, according to your records?

A. Well, according to the questionnaire, he signed it originally that he wished to appeal his case—the DSS 2, on the back of that there is a space in which a registrant may specify that he wishes his case to come before the Appeal Board, and the appeal to the Board of Appeals states, "I hereby

appeal to the Board of Appeal from the determination of the Local Board". That was signed January 26, 1942 by Nick Falbo. And there is a space to specify the relationship, which of course is "Self".

Q. Now, subsequent thereto, Defendant's Exhibit "C", with the attached statement and authorization card—which the defendant specifically wishes to be included in the Defendant's Exhibit "C"—and part of Defendant's Exhibit "C" being a special form for conscientious objectors, there is a portion in the middle of the page stricken out. Is this form generally used by conscientious objectors in making application for classification of 4-E?

A. It is the only conscientious objector form that we have.

Q. Well, the resulting classification on application of this kind usually entails 4-E classification, doesn't it?

A. No. They can claim that they are conscientious objectors and go with the inductees as an objector, but not be put into combatant service; and we have a number of our boys who have done that. They go then as 1-AO instead of 4-E.

Q. Now, in this statement appended thereto, to the conscientious objector's form, will you kindly read the last sentence in that statement?

MR. MASHANK: That is objected to, for the reason that that has not been admitted in evidence.

MR. SCHMIDT: We will withdraw that question.

Q. Will you state what this is (handing paper from file to witness)?

A. Well, it is a letter; "To Whom It May Concern"—on stationery of Watch Tower Bible and Tract Society, Incorporated, dated October 7, 1941. "This is to certify that Nick Falbo . . ."

MR. MASHANK: Just a moment. Don't read that.

Q. Just for the purpose of identification, is this letter notarized? For the purpose of identification only.

A. It is subscribed and sworn.

Q. And is there a seal to the letter?

A. There is a seal, but I can't read it.

Q. It doesn't matter. Is there a seal or not?

A. There is a seal of a notary public.

(Papers taken from file of witness marked Defendant's Exhibits "D" to "I", both inclusive).

MR. SCHMIDT: The defendant files these as Exhibits "A" to "I", inclusive, with the expectation of using them further in this case.

HERBERT M. ALLISON, a witness produced on behalf of the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MASHANK:

Q. What is your full name?

A. Herbert M. Allison.

Q. And you live in Pittsburgh?

A. That is correct.

Q. What is your business or occupation?

A. I am a special agent of the Federal Bureau of Investigation.

Q. You are attached to what office?

A. The Pittsburgh Office.

Q. And, as such special agent, were you assigned to investigate the alleged violation of Selective Service and Training Act by Nick Falbo?

A. I conducted a certain part of that investigation.

Q. And during that investigation did you contact Nick Falbo in person?

A. Yes.

Q. State whether or not you talked to him?

A. Yes, I did.

Q. Was there any statement made by the defendant with reference to receiving a notice to report for work of national importance before his Local Board?

A. He admitted that.

Q. He admitted what?

A. Receiving such an order to report.

Q. He said he received an order to report for work of national importance?

A. Yes.

Q. And do you know whether or not he has ever reported for that kind of work?

A. We have been informed by the Local Board—

Q. Well, never mind that. Do you know of your own knowledge?

A. No, I do not.

CROSS EXAMINATION

MR. SCHMIDT:

- Q. When you called upon Mr. Falbo, the defendant, for information, you had prepared a statement for him to sign, I believe, had you not?
- A. Not previously. I prepared a statement during the interview.
- Q. And you asked him to sign it?
- A. Yes.
- Q. And he refused to sign it?
- A. Yes.
- Q. He presented a statement to you on that occasion, in lieu thereof—or not in lieu thereof—did he not, to which he had his signature attached?
- A. That is correct.
- Q. Do you have that statement with you?
- A. I do.
- Q. May I see it?
- A. (Witness hands paper to counsel, and said paper is marked Defendant's Exhibit "J").

MR. SCHMIDT: The defendant files this as an exhibit, Defendant's Exhibit "J", for further consideration in this trial.

- Q. Did you read this statement?
- A. Yes, I read it.

GOVERNMENT RESTS

MR. SCHMIDT: At this time the defendant files a motion to dismiss the action. (Written motion submitted).

THE COURT: Motion denied.

MR. SCHMIDT: To which ruling of the Court the defendant respectfully excepts.

DEFENDANT'S CASE

(Mr. Schmidt opens to the jury on behalf of defendant).

NICK FALBO, the defendant, produced in his own behalf, having been duly sworn, testified as follows:

DIRECT EXAMINATION

MR. SCHMIDT:

- Q. What is your name?
- A. Nick Falbo.
- Q. Where do you reside, Mr. Falbo?
- A. 327 Hill Street, Belle Vernon, Pennsylvania.
- Q. What is your occupation or profession?
- A. A special representative known as a Special Pioneer for the Watch Tower Bible and Tract Society.
- Q. And, as such, are you a regular ordained minister?
- A. I am a regular and duly ordained minister of the Watch Tower Bible and Tract Society.
- Q. And how long have you been a regular or duly ordained minister of the Watch Tower Bible and Tract Society?
- A. I have been a regular Pioneer minister since September 1, 1940, which I have here a letter of ordi-

nation to that effect from the Watch Tower Bible and Tract Society, showing that I am a Pioneer—

MR. MASHANK: Wait just a minute. That is objected to, as reading from some paper not in evidence.

Q. We can't read from that. Now, prior to your regular appointment as a Special Pioneer, were you engaged as a regular minister of religion?

A. I was.

Q. Since what date were you engaged in such activity?

A. I have been engaged as one of Jehovah's witnesses, as a regular minister of religion, since 1930.

Q. As a regular minister of religion, have you since 1930 customarily preached and taught the principles of the Watch Tower Bible and Tract Society?

A. I have.

Q. And as a minister of the group or class of people known as Jehovah's Witnesses?

A. I have.

Q. Now, did you register under the Selective Service System?

A. I did.

Q. What was the date of your registration, do you know?

A. I believe it is October 16th of 1940.

Q. And in due course you sent in your questionnaire. That is, in due course thereafter did you send in your questionnaire?

A. I did.

Q. And in your questionnaire did you ask for a 4-D classification? I ask you to read from your questionnaire "Registrant's Statement Regarding Classification", the first sentence under "Instructions".

A. "Registrant's Statement Regarding Classification. INSTRUCTIONS.—It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The Local Board is charged by law to determine the classification of the registrant on the basis of the facts before it, which should be taken fully into consideration regardless of whether or not this statement is filed in.

"In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class 4-D".

Q. And that was your first opportunity to make claim for classification?

A. I also made claim for classification—

Q. Please answer the question. Is that the first opportunity that you had the occasion to make claim for classification of 4-D?

A. It was.

Q. Now, what was the next occasion by which you made claim for 4-D classification, as a regular minister of religion?

A. I also filed with the Board a statement which I had entitled my statement requesting a 4-D classification, and as duly and regularly ordained minister of the gospel.

- Q. And in your conscientious objector's form, which is a part of your questionnaire, would you mind reading the last sentence therein?

MR. MASHANK: Wait a minute. That is objected to, for the reason it is not in evidence.

MR. SCHMIDT: We will withdraw that question.

- Q. Is this the conscientious objector's form that you filled out (handing Defendant's Exhibit "C" to witness)?

A. It is.

- Q. Marked Defendant's Exhibit "C". Is the handwriting therein your handwriting?

A. It is.

- Q. And attached thereto, is that statement signed by you?

A. It is.

- Q. And also appended and attached thereto is your authorization card. Does that bear your signature, in your own writing?

A. It does.

MR. SCHMIDT: We offer Defendant's Exhibit "C" in evidence.

MR. MASHANK: If the Court please, I haven't any objection to the admission of this, provided it is limited to the fact that this man claimed to be a conscientious objector, and that claim was respected by the Board and he was placed in Class 4-E. I think it should be limited to that purpose only.

MR SCHMIDT: If the Court please would rather be an injustice to the defendant to limit the conscientious objector's form to anything else than what appears on the face thereof. We offer this in evidence for what it is, which includes the statement and the authorization card therein.

MR. MASHANK: We say that statement and authorization card does not mean anything, because it is not authenticated. We don't know what it is. It is only a printed card, no proof as to who signed it or had any authority to sign it.

THE COURT: As I understand it, you have no objection to this paper as being a claim for the privileges extended to conscientious objectors?

MR. MASHANK: That is right, Your Honor. In other words, he is claiming that he is a conscientious objector. We agree with him, and we have placed him in that classification, and that is all that paper is good for.

THE COURT: Yes, I would think that is the total of its evidential value, for what it purports to be on its face. I do not understand they offer it for any other purpose.

MR. SCHMIDT: If Your Honor please, on its face you will note on the front page there that the applicant has crossed out the portion of the conscientious objector's application which requests him to be placed in the classification as a conscientious objector; but this brings to

the attention of the Appeal Board that he is a minister.

THE COURT: He says, "I claim exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religion, training and belief to the participation of war in any form and the participation in any service which may be under the direction of military authorities." I don't see any claim here that he presents that he is a minister of the gospel.

MR. MASHANK: Nothing in that document.

THE COURT: If it is offered for the purpose of showing that he is a minister of the gospel, it is clearly objectionable, because there is nothing in the paper that makes that claim.

MR. SCHMIDT: We present it for the purpose, to let the instrument speak for what is on the face thereof. There is nothing—

THE COURT: If it is only for the limited purpose, the Government, as I understand it, makes no objection to your offering this for the purpose of showing that he is a conscientious objector.

Q. Furthermore, I will ask you: Can you explain to the Court and jury what this letter or affidavit marked Defendant's Exhibit "D" is?

MR. MASHANK: Wait just a minute. I believe he can identify an exhibit, but he cannot tell us what is in it.

Q. For the means of identification, what is Defendant's Exhibit "D"?

A. It is my certificate of ordination from the Watch Tower Bible and Tract Society, and issued to me as a minister.

MR. SCHMIDT: The defendant offers this in as evidence.

MR. MASHANK: If the Court please, this is objected to, for the reason it has no bearing on any issue in this case. The facts set forth there have already been passed upon by the Board of Appeals and the Local Board, something that this Court cannot disturb.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which an exception is taken.

Q. For the purposes of identification, will you kindly relate what Defendant's Exhibit "I" is?

A. That was a special letter sent by the Watch Tower Bible and Tract Society to Mr. M. W. Acheson, Hearing Officer, United States Attorney.

MR. SCHMIDT: I present this as evidence in the case.

MR. MASHANK: I object to this, for the reason there is nothing in there to prove or disprove any issue in this case; and for the further reason that relates to questions already passed upon by the Board of Appeals and Local Board, and something that this Court cannot disturb.

THE COURT: We sustain the objection.

Q. Can you, in substance, briefly state what Defendant's Exhibit "H" is?—

MR. SCHMIDT: Before entering that, the defendant reserves an exception to the ruling of the Court on the letter addressed by the Watch Tower Bible and Tract Society to Mr. Acheson.

Q. Will you now briefly state what are Defendant's Exhibits "E", "F", "G" and "H"?

A. These are affidavits which have been duly sworn to by members of Jehovah's Witnesses and other members that are not Jehovah's Witnesses but other religious sects, that they have recognized me as one of Jehovah's Witnesses and as a Pioneer Minister for the Watch Tower Bible and Tract Society.

MR. SCHMIDT: And the defendant offers these as evidence.

MR. MASHANK: These are objected to, for the reason they are not the best evidence.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which an exception is respectfully taken.

Q. Could you briefly state what Defendant's Exhibit "B" is?

A. It is an explanation to the Board—

MR. MASHANK: Just a minute. Don't tell us the contents of that paper; just identify it.

- A. (Continuing) It is a statement which I wrote to my Local Board, which I signed, concerning their letter of delinquency.

MR. SCHMIDT: We offer this as evidence.

MR. MASHANK: We object to this, for the reason it is of no evidential value and it refers to matters that have already been passed upon by the hearing officer, the Board of Appeals and the Local Board, and something which this Court cannot pass upon.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant respectfully excepts.

- Q. And what is this document marked Defendant's Exhibit "A",—without disclosing the contents?
- A. This was a letter which I received from my Local Board, "Notice (to Registrant) of Suspected Delinquency".

MR. MASHANK: No objection.

MR. SCHMIDT: May it be entered by the Court as evidence?

MR. MASHANK. I have no objection to the admission. You can read it to the jury too, if you want to.

- Q. For the purpose of identification, what is Defendant's Exhibit "J", Mr. Falbo?
- A. This is my statement which I handed to the F.B.I. agent, which I spoke to here one time in this building, in reference to my work.

Q. And is that signed—does that paper bear your signature?

A. It has my signature; and I also had this notarized.

MR. SCHMIDT: Defendant offers this as evidence in this case.

MR. MASHANK: This is objected to, for the reason it is a self-serving declaration, also contains conclusions, and also refers to matters that have already been passed upon by the Board of Appeals, the Hearing Officer and also the Local Board, and also a matter which cannot be disturbed by this Court.

THE COURT: We sustain the objection.

Q. Now, Mr. Falbo, when you made application for a hearing at your Local Board, did you go down there?

A. I did.

Q. And for the purpose of the record, would you mind relating just what took place?

MR. MASHANK: This is objected to, as being immaterial in this issue.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which an exception is kindly taken, for the purposes of the record, in order that the reviewing court might determine, the witness will make the following proffer—

MR. MASHANK: You mean an offer?

MR. SCHMIDT: Yes. (At side bar): When the defendant went down to the Board to have his hearing—the Local Board under which he was registered—four members were present, and when he announced that he was one of Jehovah's Witnesses one of the Board members, who is a minister, or purports to be, said, "I do not have any damned use for Jehovah's Witnesses". He attempted to produce evidence by affidavits from the Watch Tower Bible and Tract Society and from his work that he had done, as well as the scriptural authority from the Bible, and the Board stated, "We have no time to listen to this", and he was dismissed.

MR. MASHANK: Objected to, as being immaterial and irrelevant.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which ruling the defendant respectfully excepts.

CROSS EXAMINATION

MR. MASHANK:

Q. Mr. Falbo, are you a graduate of any theological seminary?

A. Christ Jesus and the Apostles weren't, and therefore I am not either.

Q. As I understand it, you have been a minister since 1930?

A. That is right.

Q. That was twelve years ago?

A. Absolutely.

- Q. And you are about twenty-seven now, aren't you?
A. I am.
Q. So you were a minister at the age of fifteen. Is that right?
A. That is right.
-

ANGELO GALUPPO, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

MR. SCHMIDT:

- Q. What is your name?
A. Angelo Galuppo.
Q. And where do you reside, Mr. Galuppo?
A. 411 Rostraver Street, Monessen, Pa.
Q. And what official position do you occupy in that vicinity with respect to Jehovah's Witnesses?

MR. MASHANK: Now, just a minute. Your Honor, I ask for an offer at side bar as to what is proposed to be proved by this witness.

MR. SCHMIDT: (At side bar) This witness will testify that he is personally acquainted with the defendant since 1930, and the witness has the means of knowing that the defendant has a reputation in the community where he lives for truth and honesty, that this reputation is good, that the defendant has never been convicted of any crime or misdemeanor; that the reputation is that the defendant is an ordained minister of religion and is en-

gaged in no other occupation, either manual or in any other way; that the defendant is a Special Pioneer appointed by the Watch Tower Bible and Tract Society, and he must put in 175 hours per month in this capacity; the witness is the managing agent of the Watch Tower Bible and Tract Society in the Monessen district, and at various times the defendant has worked under the supervision of the witness, Mr. Galuppo; that the defendant regularly conducts Bible study classes in Monessen and engages in house to house work in the proclamation of the knowledge of the Bible, in much the same manner as did Christ and his early disciples; that the defendant at all times since his registration and before to the extent of approximately a year theretofore has spent his entire time in the ministerial work, with the exception of—that he was so engaged in full-time service as a minister since 1940, with the exception of six months; that on account of his enforced sickness the headquarters of the Selective Service System was so advised.

MR. MASHANK: This is objected to, for the reason the truth and veracity are not at issue in the case; and, second, for the reasons that the matters proposed to be proved by this witness have already been passed upon by the Local Board, the Hearing Officer, and the Appeal Board, and this Court has no authority to disturb the findings of those tribunals; and, third, it will not prove or disprove any issue in this case.

THE COURT: Sustain the objection.

MR. SCHMIDT: To which the defendant kindly reserves an exception.
(Witness withdrawn).

NICK FALBO, the defendant, recalled, testified as follows:

DIRECT EXAMINATION

MR. SCHMIDT:

Q. Mr. Falbo, when you were—or when were you appointed as a Pioneer of the Watch Tower Bible and Tract Society?

A. September 1, 1940 .

Q. What are the requirements to maintain a Pioneer status with respect to the Watch Tower Bible and Tract Society?

MR. MASHANK: That is objected to, as being irrelevant and immaterial to this issue.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which ruling an exception is taken, and the defendant makes the following offer: (At side bar) The requirements of a Pioneer of the Watch Tower Bible and Tract Society are that the individual must put in a least 150 hours per month in preaching the gospel; the Pioneer status is a privileged status under the organization, under which the individual who puts in this number

of hours is granted compensation by means of reduced costs of literature that is distributed among the people, so that he might defray his expenses.

MR. MASHANK: Objected to, as being incompetent, irrelevant and immaterial.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant kindly takes exception.

Q. Now, subsequent to your appointment in September, 1940; as a general pioneer, were you subsequently appointed to the classification of a Special Pioneer?

MR. MASHANK: Objected to, as being incompetent, irrelevant and immaterial.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant kindly takes exception, and makes the following offer: "Yes".

MR. MASHANK: Wait a minute. You can't make an offer on something that is objected to and objection is sustained.

MR. SCHMIDT: The defendant excepts to the objection and then makes the following offer: "Yes" — That is the offer, just "Yes" in answer to the question.

Q. And the next question: When did you become a Special Pioneer?

A. April 16, 1942.

THE COURT: I think this whole matter is covered by your first offer under the rules of court.

MR. SCHMIDT: If your Honor please, the first offer covered the matter generally of a Pioneer, but now he has since April 16, 1942, entered a work of the same kind but requiring a greater number of hours.

MR. MASHANK: We still say that is incompetent, irrelevant and immaterial to this issue and does not prove anything that is before this court.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant takes exception; and if he were to answer he would—

THE COURT: I don't understand your practice in that respect. You make an offer of proof and opposing counsel objects and we sustain the objection; that is all there is to it.

MR. MASHANK: He wants to put on the record something the witness would have answered had the offer been permitted.

THE COURT: No, I don't think that can go into the record. The assumption would be on review of this case you would be able to prove what your offer contains.

Q. Now, Mr. Falbo, prior to your appointment as a Pioneer on September 1, 1940, approximately how much time did you spend in the ministerial work?

MR. MASHANK: That is objected to, for the reason that matter has already been passed upon by proper tribunals.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant takes an exception and makes the following offer, which can be subject to proof: Prior to his Pioneer appointment on September 1, 1940, the defendant spent not less than thirty hours per month in ministerial work.

MR. MASHANK: Objected to, for the reason that has been passed upon by the proper tribunals, the proper administrative bodies.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant kindly takes an exception.

Q. Now, can you relate to the Court and jury the period of time that you on account of sickness became incapacitated to do this work since you have been a Pioneer?

MR. MASHANK: If the Court please, that is objected to, for the reason it is immaterial and irrelevant to this issue.

THE COURT: We sustain the objection.

MR. SCHMIDT: To which the defendant kindly takes an exception.

**DEFENDANT RESTS
TESTIMONY CLOSED**

(Note: Counsel for respective parties waive oral arguments to the jury).

ORAL CHARGE OF THE JURY

Schoonmaker, J.

Members of the Jury:

The defendant, Nick Falbo, is on trial before this court and you as the jury on an indictment returned into this court charging him with the violation of the Selective Training and Service Act of 1940. The relative responsibilities of the Court and the jury with reference to this case are these: It is the duty of the Court, or the Judge presiding, to determine what the law is. It is the duty of the jury to take the law as given you by the Court and apply that law to the facts of the case as you find the facts to be. In other words, the Judge is the judge of the law and the jury is the judge of the facts. If there is a dispute in testimony between the witnesses, we of course cannot tell you which witnesses to believe and which to disbelieve.

In this case, as in every criminal case, the defendant comes into court presumed to be innocent, and that presumption of innocence rests with the defendant until you, the jury, become satisfied by the proof that he is guilty of the offense charged against him.

The burden rests upon the Government to satisfy you by proof beyond a reasonable doubt of the guilt of the defendant before you can render him guilty by your verdict. And by "proof beyond a reasonable doubt" we do not mean that all possible doubt must be excluded from the mind. It must be a reasonable and honest doubt arising from the evidence, and just such

a doubt as might occur to any one of you when called upon to consider a serious matter in your own private affairs which would cause you to hesitate in arriving at a particular conclusion.

Now, in this case the defendant is charged with the violation of the Selective Training and Service Act of 1940 in that he failed to obey the orders of Local Draft Board No. 11 at West Newton, Pennsylvania, to report for assignment to work of national importance, having been classified in Class 4-E by the Local Board as a conscientious objector. Now, that classification by the Local Draft Board is binding upon this court and upon the jury. We cannot say whether the Board correctly classified this man. If he has any legal objection to the classification in which he is placed he could have that matter further determined by the court, by reporting to the Local Draft Board for classification, as required by the statute, and then presenting a petition for a writ of habeas corpus to release him from that assignment; and, if that were true, then the court, or the judge, would have to pass upon that question and determine whether or not he was properly classified as a conscientious objector instead of a minister of the gospel, as he claims to be. With that in this particular trial we have nothing to do. The court and the jury must accept as a fact that he was classified in Class 4-E, as a conscientious objector. And then, if you find from the facts that he failed to report—and there is no evidence to the contrary, and even he himself admits it on the witness stand, that he did not report—it would be your duty to find him guilty.

Have counsel on either side request for further or additional charges on any point?

MR. MASHANK: No, Your Honor.

The Court (continuing): Your verdict will be returned in written form, and on that form you will say whether you find the defendant guilty or not guilty.

MR. SCHMIDT (at side bar): The defendant respectfully objects to that portion of the charge made by the Court in substance that if the defendant wanted to test the classification he should have reported and tested the classification by means of habeas corpus proceedings.

The second objection that the defendant takes to the charge is that the classification made by the Local Board or the Board of Appeals, whichever it might have been, is binding upon this court, the defendant holding that such would be the case where there is no prejudice and where a full and fair hearing is accorded to the defendant, but in this case such did not obtain.

The defendant offers the following specific charges to the jury: "If from all the facts in the case you find that the Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing, then you will return a verdict for the defendant.

"Second: If from all the facts in the case you find that the defendant at all times dur-

ing the course that he was under the jurisdiction of the Selective Service System has been a regular and/or duly ordained minister of religion, and that the Local Board and Board of Appeals had knowledge of this from the evidence presented, then you will return a verdict for the defendant."

THE COURT: We decline to make the requested charges.

MR. SCHMIDT: To which ruling of the Court the defendant respectfully excepts.

(Jury retires at 3:55 o'clock P. M.).

(And now, Tuesday, December 1, 1942, at 4:05 o'clock P. M., the jury returned to the court room with a verdict of "guilty".)

MR. MASHANK: I move for judgment in this case.

THE COURT: Let the defendant come before the Court. (Defendant comes before the Court). Is there anything to be said by the defendant or in his behalf at this time?

THE DEFENDANT: I would like to say that any person or persons that may cause me or take me away from my God-given commission as a minister of the gospel of Jehovah God and His Kingdom of Christ Jesus, which is the only hope for mankind, are going

to be tried and are being tried and have been tried by Jehovah God right here today, and they will answer to Him for their action.

And, furthermore, you have received all the information from me concerning my ministerial status, that I am an ordained minister of Jehovah God and Christ Jesus, and I have received my ordination from Almighty God, as stated in Isaiah 61: 1 and 2, which reads or quotes: "The spirit of the Lord God is upon me; because the Lord hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; 2. To proclaim the acceptable year of the Lord, and the day of vengeance of our God; to comfort all that mourn". Thus my God-given commission, no man has authority to take me away from such commission, which God has given me and which I have consecrated my life to carry out.

Also in Matthew 24:14 it states that "This gospel of the Kingdom shall be preached in all the world for a witness unto all nations; and then shall the end come." Jehovah God has given me that commission, to bring me to this court today, that people may hear of this Kingdom under Christ Jesus, which is the only hope of mankind; and according to the scriptures, soon God will act to destroy the wicked from the face of this earth.

Now, in Acts 20:20, Christ Jesus and also his apostles, which command that ye—that we should follow in His footsteps, and these apostles: "I have taught you publicly and from house to house",—as in

the preaching of the gospel of God's Kingdom, as I have been engaged in since 1930 and up to the present day. If anybody takes me away from that duty, then they are responsible to Almighty God and to His Son, Christ Jesus, His chief King and redeemer of mankind. And soon the Battle of Armageddon, which is to take place, will vindicate the great name of Almighty God, and the purpose of that is to destroy all wickedness from the face of this earth, because Theocracy is the only Kingdom and the only true source which will bring peace and everlasting life to all persons of good will on this earth. My duty was to preach this gospel of God's Kingdom as the facts, as I have presented to the Court here. Man has tried and is taking me away from my God-given commission, which they have no authority to take me away from them. My consecration to Almighty God has been symbolized by one immersion, which is known as baptism, and that is to give up my life, if necessary, to the preaching of the gospel of God and His Kingdom under Christ Jesus, that the people of the earth may know "Jehovah is the Most High over all the earth"; as in the written Psalms 83:18, and the reason stated there, that the reason the earth today is in such condition and the reason why God has permitted the kings of the earth to remain up to this present day,—he says, "That man may know that thou, whose name alone is Jehovah, are the Most High God over all the earth."

Today God has given the people to hear concerning Him and His Kingdom under Christ Jesus. That is why Jehovah's witnesses preach the gospel of God's Kingdom from house to house, that everyone may hear concerning His Kingdom; and, regardless of what

they have against Jehovah's witnesses, may take action against Jehovah's witnesses, it is God that is giving them the privilege and the opportunity to knowing which course they may take in order to receive protection, and that course is they must choose to serve God in Christ Jesus, in Theocracy, which is the only help for mankind, and they will receive protection from Almighty God. Otherwise, if they take another course, such as the nations today are taking, and they are shedding human blood for no just cause, then they are responsible to Almighty God, and they by their colors, such stand as they take against Jehovah's witnesses, are proving to Almighty God, as the Bible states, they are goats, and Christ Jesus today shall separate the nations from the earth, separate the sheep from the goats, and put the sheep on the right side and the goats on the left side, which are going to be destroyed—

THE COURT: Are you joining up with the Japanese?

THE DEFENDANT: Sir?

THE COURT: Are you joining up with the Japanese?

THE DEFENDANT: I decidedly am not.

THE COURT: You seem to be on one side here.

THE DEFENDANT: I absolutely am not; and I am stating that the nations today are against Jehovah God and His Kingdom under Christ Jesus, because if they were not against Jehovah God and His Kingdom they would not take such action against Jehovah's witnesses and try to stop them and do stop them in preaching the gospel of God's Kingdom, as God has commanded them to preach. Isaiah 43:12 states, "ye

are my witnesses, saith the Lord, that I am Jehovah." Now, I am a minister of the gospel of Jehovah God and His Kingdom. I have given the Court all the evidence—affidavits, certificate of ordination—that has been supplied to me from the Watch Tower Bible and Tract Society, showing that I am recognized as a minister and have been recognized as a minister, known as a Pioneer, since 1940, of September 1st, and now at the present time and since April 16, 1942, I have been registered with the Watch Tower Bible and Tract Society as a Special Pioneer. The reason I had been promoted from a Pioneer to a Special Pioneer is because I have chosen to serve Almighty God to a greater capacity and the Society has appointed me to the ranks of Special Pioneer duties, because of my well activities report prior to my time of being appointed as a Special Pioneer. In other words, when I was working as a Pioneer, I had a well report with the Watch Tower Bible and Tract Society; they therefore have promoted me to the ranks of Special Pioneer, which I have been since April 16th and am today, and which the Court today is taking me away from, and they are being responsible to Almighty God for such action.

THE COURT: Well, my conscience is clear along those lines. You evidently have overlooked the portion of the scripture that says to "render unto Caesar the things that are Caesar's and unto God the things that are God's".

THE DEFENDANT: That is right, sir; the scripture does say to "render unto Caesar that which is Caesar's and to render unto God that which is God's". It doesn't say to render unto Caesar that which is God's, and therefore it is up to a Christian to make a separa-

tion line there, to choose for themselves whether they are serving Caesar or Almighty God.

THE COURT: Well, you can't be a member of society without rendering the duties of citizenship. The sentence of the Court is that you be committed to the custody of the Attorney General for confinement in a federal penitentiary for five years, and stand committed until this sentence is completed.

THE DEFENDANT: I would like another word, please.

THE COURT: All right.

THE DEFENDANT: Other ministers of other religious faith; whether Protestant, Jewish or any other religious faith—Catholic or whatever they may be—they have received their proper classification and had no trouble, because they—as they, as the Bible says, they are of the world, and that is today the proof showing how, that they are receiving a mark of the beast, and the Bible says though they receive the mark of the beast they will be protected by the rulers and politicians of the earth; and Jehovah's witnesses, which are not having the mark of the beast, which is Satan, who has religious political allies on this earth, are not receiving consideration because they are Jehovah's witnesses and have taken a course of serving Almighty God and Christ Jesus.

THE COURT: Well, you had better go to some other country then, if you don't like the kind of government we have here.

I HEREBY CERTIFY that the foregoing pages contain a correct transcript of all the evidence taken in the trial in the case of UNITED STATES OF AMERICA vs. NICK FALBO, at No. 11171 Criminal; together with the offers of counsel, the objections thereto, the rulings thereon and the exceptions thereto, and the Charge of the Court and exceptions thereto.

HARRIET COLE THOMAS,
Official Reporter.

Wednesday, December 16, 1942.
Pittsburgh, Pennsylvania.

I, F. P. SCHOONMAKER, Judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, rulings thereon and exceptions thereto, and the Charge of the Court and the exceptions thereto, in the case of UNITED STATES OF AMERICA vs. NICK FALBO, at No. 11171 Criminal; all of which, so certified, is ordered to be filed and to become a part of the record this 2nd day of March, 1943, at Pittsburgh, Pennsylvania.

F. P. SCHOONMAKER,
Trial Judge.

Government's Exhibit No. 1, Registration Card

Govt # 21 12/14/47

| | | |
|---|--------------------------------------|---|
| SERIAL NUMBER 2352 | 1. NAME (Print) Nick Folbo | ORDER NUMBER 2510 |
| 2. ADDRESS (Print) 327 Hill St. N.B.V. 651 Pa | | |
| 3. TELEPHONE — | 4. AGE IN YEARS 25 | 5. PLACE OF BIRTH Bogor, Ind. Pa |
| DATE OF BIRTH Apr 20 1915 | | 6. COUNTRY OF CITIZENSHIP 1 |
| 7. NAME OF PERSON WHO WILL ALWAYS KNOW YOUR ADDRESS Mrs. Casimira Folbo | | 8. RELATIONSHIP OF THAT PERSON Mother |
| 9. ADDRESS OF THAT PERSON 327 Hill St. N.B.V. 651 Pa | | 10. EMPLOYER'S NAME — |
| 11. PLACE OF EMPLOYMENT OR BUSINESS — | | |
| I AFFIRM THAT I HAVE VERIFIED ABOVE ANSWERS AND THAT THEY ARE TRUE. | | |

REGISTRATION CARD
D. M. S. FORM 1

(upper)

16-17396

Nick Folbo

REGISTRAR'S REPORT

| DESCRIPTION OF REGISTRANT | | | |
|---------------------------|------------------|------------------|------------|
| SEX | HEIGHT (Approx.) | WEIGHT (Approx.) | COMPLEXION |
| White | ✓ | | |
| Negro | | | |
| Oriental | | | |
| Indian | | | |
| Polish | | | |

| HAIR | COMPLEXION |
|-------|------------|
| Black | ✓ |
| Gray | |
| Brown | |
| Black | |
| Gray | |
| Red | |
| Dark | |
| Light | |
| Dark | |
| Black | |

Other obvious physical characteristics that will aid in identification. *Note on Right upper lip*

I certify that my answers are true; that the person registered has read or has had read to him the over answers; that I have witnessed his signature and that all of the answers of which I have knowledge are true, except as follows:

Register for *Fred Stunghele*
1777 North 10th St. Pa
Date of registration *Oct 16, 1940*

| |
|---|
| L. B. No. 11 106 SECOND STREET. STAMP OF LOCAL SOCIETY |
|---|

WEST NEWTON, (WASHINGTON CO.)
PENNSYLVANIA

Govt's Exhibit No. 2, Selective Service Questionnaire

Govt Ex # 2
12/14/42
HT

SELECTIVE SERVICE QUESTIONNAIRE

Order No. 2510

Date of mailing Aug. 13, 1941

| | |
|-------------------------|-----|
| LOCAL BOARD NO. 11 | |
| WESCHELLEND COUNTY | |
| 127 S. Second Street | 38 |
| WELT NEWTON, PENNA. | 911 |
| (Branch of Local Board) | |

Name _____
 Nick (None) Falbo Last _____
 Address 327 Hill St. _____
 (City or town) (County) (State)
 N. Belle Vernon Westa'd Pa.
 (City or town) (County) (State)

NOTICE TO REGISTRANT

You are required by the Selective Training and Service Act of 1940 to fill out this Questionnaire truthfully and to return it to this Local Board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

THIS QUESTIONNAIRE MUST BE
 RETURNED ON OR BEFORE

Aug. 23, 1941

Robert Smith
 Member of Local Board

(The above notice shall be filed in by the Local Board before the Questionnaire is mailed to the registrant.)

INSTRUCTIONS

This Questionnaire is intended to furnish the Local Board with information to enable it to classify you in one of the following Selective Service classes:

Class I includes men who are available for induction into the armed forces of the United States.

Class II includes those whose induction is deferred because of the importance to the Nation of the service they are rendering in their civilian activities.

Class III includes those whose induction is deferred because they have persons dependent upon them.

Class IV includes those whose induction is deferred by law and those unfit for military service.

You will receive notice from your Local Board of your classification.

Oaths required in the Questionnaire may be administered by (1) a member or third clerk of a Local Board or Board of Appeal, member or associate member of an Advisory Board for Registrants, or a Government Appeal Agent, (2) any Postmaster, Notary Public, or any Federal, State, county, or municipal officer or any person authorized to administer oaths. No fee should be charged for this service.

Advisory Boards for Registrants are organized to assist registrants in completing their Questionnaires. No charge will be made for this service. If there is no Advisory Board

available, you must nevertheless complete your Questionnaire.

If the registrant is an inmate of an institution and is unable to complete the Questionnaire, the executive head of the institution shall communicate those facts immediately to the Local Board.

1. Make no alterations in the printed matter in this Questionnaire.

2. All spaces in this Questionnaire that apply to registrants must be filled in with the proper words. Spaces that do not apply must be marked with a "v."

3. If you furnish additional information or affidavits with your Questionnaire, attach the same securely to it.

4. If you are already in the active military or naval service, obtain a certificate to that effect from your commanding officer and attach same to your Questionnaire.

5. After this Questionnaire has been returned, report to your Local Board at once any change of address or any new fact which may affect your classification.

When a notice affecting you is posted at the office of your Local Board, you are bound to perform the duty required even if no notice reaches you by mail.

Any statements in this Questionnaire marked "Confidential" are for information only of the officials duly authorized under the Regulations.

USE INK OR TYPEWRITER IN FILLING OUT THIS FORM

D S S Form 40
 (Rev. 3-15-41)

Govt's Exhibit No. 2, Selective Service Questionnaire

STATEMENTS OF THE REGISTRANT

Series I—IDENTIFICATION

INSTRUCTIONS—Every registrant shall fill in all statements in this series.

1. My name is (print) **NICK** (First name) (Middle name) (Last name) **FALBO**
2. In addition to the name given above, I have also been known by the name or names of **None** (If none, write "None")
3. My residence now is **Belle Vernon** (Town—(City, town, or village)) **327 Hill St.** (Number and street or R. D. route) **Hatfield** (County) **Penn.** (State)
4. My telephone number now is **None** (Town) (Exchange) (Number) (If you have no phone, write "None")
5. My Social Security number is **175-61-0512** (If none, write "None") My Railroad Retirement number is **None** (If none, write "None")
6. I was **26** years of age on my last birthday

Series II.—PHYSICAL CONDITION (Confidential)

INSTRUCTIONS—Every registrant shall fill in all statements in this series.

1. To the best of my knowledge, I **have** (have, have not) physical or mental defects or diseases. If so, they are **Liver trouble** (List defects or diseases here)
2. I **am not** an inmate of an institution. If so, its name is _____ and it is located at _____ (Name of hospital, prison, or other institution)

Series III.—EDUCATION

INSTRUCTIONS—Every registrant shall fill in all statements in this series.

1. I have completed **8** years of elementary school and **2** years of high school. (Number) (Number)
2. I have had the following schooling other than elementary and high school (if none, write "None")
- | Name of Vocational School, College, or University | Course of Study | Length of Time Attended |
|---|-----------------|-------------------------|
| None | | |

3. I **can** read and write the English language. (Yes, (no))

Series IV.—PRESENT OCCUPATION OR ACTIVITY

INSTRUCTIONS—Every registrant shall fill in No. 1 of this series. Every registrant now at work shall fill in No. 2. Every registrant now unemployed shall answer No. 3. and every registrant who is now a student, whether or not he has had a job shall fill in No. 4.

1. I am now ☐ working at the job described under No. 2 below ☐ unemployed for the reasons and under the circumstances described in my answer to No. 3 below ☐ a student pursuing the course of study described under No. 4 below
2. (a) The job I am now working at is **leave full time for example Construction draftsman, turret lathe operator, stationary engineer, farm laborer, promoting attorney, physics teacher, policeman, marriage counselor, etc.**
- Permit for State Guard to the anti-Race Society**
- (b) I do the following kind of work in my present job (be specific—give a brief statement of your duties): **Monitor Preaching the Gospel of God's Kingdom**
- (c) I have had **11** years experience in the kind of work.
- (d) My average **None** earnings in my present job are **None** (Confidential)

Govt's Exhibit No. 2, Selective Service Questionnaire

Series IV.—PRESENT OCCUPATION OR ACTIVITY.—Continued

(e) In my present job, I am—

- ☐ a regular or permanent employee, working for salary, wages, commission, or other compensation, I have worked years in my present job, and expect to continue indefinitely on it.
- ☐ a temporary or occasional employee; I expect that my present job will end about (Date)
- ☐ an apprentice under a written or oral agreement with my employer, which expires (Date)
- ☐ an independent worker, working on my own account, not hired by anyone, and not hiring any help.
- ☐ working for my father or for the head of my family, but receiving no pay.
- ☐ an employer or proprietor hiring paid workers.

(Do so by tick mark only)

(f) I now employed in national defense work.

(g) My employer is

(Name of organization or proprietor, and business or occupation)

(Address of place of employment—street or R. F. D. route, city, and state)

whose business is

(For example: Farm, airplane engine factory, retail food store, W. P. A.)

(h) Other business or work in which I am now engaged is

(If none, write "None")

INSTRUCTIONS.—If your employer believes that you are a necessary man in a necessary occupation, it is his duty to fill out Form 49 requesting your deferment. You may also attach to this page any further statement by yourself which you think the Local Board should consider in determining your classification. Such statement will then become a part of the Questionnaire.

3. If you are not now working because of some seasonal or temporary interruption, attach to this page a statement (a) explaining what the interruption is, when it began, and when you expect to be able to resume your work; and (b) supplying substantially the same information regarding your last job as is required in Items 2 (a) to 2 (f) above.

4. (a) If a student, I am majoring in preparing for (Occupation or profession)

at (Name and address of school or college)

(b) I expect to complete this training on (Date) (c) I intend to take an examination for license in Date of examination

INSTRUCTIONS.—A student who believes that he should be placed in Class II because preparing for a necessary occupation should see that the head of his school files with the Local Board the necessary supporting evidence.

Series V.—AGRICULTURAL OCCUPATIONS

INSTRUCTIONS.—Every registrant who works on a farm shall fill in this series, in addition to filling in Series II and VI.

1. I work on or operate a farm as—

- ☐ sole owner of the farm
- ☐ joint owner with
- ☐ hired manager
- ☐ cash tenant or renter
- ☐ standing rent tenant
- ☐ share cropper
- ☐ share tenant
- ☐ wage hand (hired man)
- ☐ unpaid family worker

(Do so by tick mark only)

(Name)

(Address)

My agreement (if any) expires (Month) (Day) (Year)

2. I have been engaged in farm work for years. 3. I live on the farm with which I am connected.

(Do, do not)

4. I actually and personally responsible for the operation of the farm on which I work.

(Do, do not)

5. The principal crops and livestock of the farm I operate or work on are

Name of crop

When harvested in Year

Kind of livestock

Number of head, cows, etc.

6. The number of people who work on this farm is of whom are hired hands.

(Number)

(Number)

7. Other facts which I consider necessary to present fairly the farming or farm work I have described and my connection with

It is a ground for classification are (if none, write "None")

Govt's Exhibit No. 2, Selective Service Questionnaire

Series VI.—OCCUPATIONAL EXPERIENCE, QUALIFICATIONS, AND PREFERENCES

INSTRUCTIONS.—Every registrant shall fill in items 1, 2, and 3 in this series. Include in item 1 any formal apprenticeship served. Items 4 and 5 are optional and are designed to aid the Reemployment Division in restoring you to civilian employment after completion of military service.

1. I have also worked at the following occupations other than my present job, during the past 5 years. If none, write "None".

| Occupation (Give full title, for example, turret-light operator, farmer, etc.) | Kind, or Work Done (Indicate—give a brief statement of your duties) | Years Worked | |
|---|--|--------------|------|
| | | From— | To— |
| <i>book</i> | <i>writing resumes</i> | 1917 | 1918 |
| | | 19 | 19 |
| | | 19 | 19 |

2. My usual occupation, or the occupation for which I am best fitted, is *Electrician*.
3. I *am not* licensed in a trade or profession, if so, I am licensed as _____
(Give, say, electrician)
4. I have worked in the following State or States during the past 5 years: _____
(For example, Maryland, Missouri, Kansas, Maryland, Missouri)
5. I prefer the following kind of work: _____
(If you would, would you) consider accepting a job which would require me to move away from my present home: _____

Series VII.—FAMILY STATUS AND DEPENDENTS (Confidential—except as to names and addresses of claimed dependents)

INSTRUCTIONS.—Every registrant shall fill in the statements numbered 1 and 2 in this series.

1. I am ☒ single. ☐ widower. ☐ divorced. ☐ married; I live with my wife, if not, her address is _____
(Give the address of the person with whom you were married)
2. (a) I have _____ children under 18 years of age. (b) Of these children, _____ live with me in my home.
(Give number)

INSTRUCTIONS.—Every registrant who lives in a family group and contributes to the support of that group shall fill in statement No. 3. "Family group" as used in this statement means two or more persons related by blood, marriage, or adoption, who live together and who pool all or a substantial part of their individual incomes for their joint support. (Such a group may not always include everyone who lives in the same house or eats at the same table. For example, when a registrant and his wife and children share a house with other relatives but do not share the income of those other relatives the family group to be listed here would include only the registrant and his wife and children.)

The information here given is intended to describe only the economic situation of the family group as it now exists and is not intended to suggest that by altering their present domestic arrangements, present dependents of the registrant might obtain support from other persons who are not now supporting them.

3. (a) The following is a list of all members of the family group in which I live (list yourself first):

| Name | Sex | Age last birthday | Relationship to me | Does he or she contribute to the support of the family group? If not, contributing what? (Give during past 12 months) |
|----------------------|------|-------------------|--------------------|---|
| (Name of registrant) | Male | | Self | Contributes |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

(b) I contributed \$_____ during the last 12 months to the support of the above-listed family group.

(c) In addition to the earnings shown in table 3 (a), only the following other income was received by members of the family group during the past 12 months. (State the nature and source of every item of income whether cash or other thing of value. Include income from pensions, rental payments, and contributions from persons outside the group. Give name, address, relationship, and age of each person outside the family group making such

Govt's Exhibit No. 2, Selective Service Questionnaire

SERIES VII—FAMILY STATUS AND DEPENDENTS—Continued

contributions

INSTRUCTIONS: Every registrant who contributes to the support of one or more persons who are not members of the family group listed above shall fill in statement No. 4.

4. (a) The following persons who are not members of the family group listed above depend wholly or partly for support on what I earn by my work in my business, occupation, or employment; they had no other source of income during the past 12 months, except as stated below:

| Age and address | Sex | Age last birthday | Relationship to me | How much I contribute to this person's support | Amount not contributed by me (past 12 months) | All other income received by this person (past 12 months) |
|-----------------|-----|-------------------|--------------------|--|---|---|
| | | | | | \$ | \$ |
| | | | | | | |
| | | | | | | |

(b) Of the amounts contributed by me to dependents listed in 4 (a) only \$ _____ contributed to: _____ (Name of person) _____ (If none, write "None") _____ was in pay went for my own board and lodging.

(c) The sources of the "other income" shown in the last column of the table just above were as follows: (Give name of dependent and state whether income was earned or contributed; if contributed give name of dependent, and name and address of person or agency contributing.) _____

(d) The income I earned from my work in my business, occupation, or employment during the past 12 months was \$ _____.

My income from all other sources during the past 12 months was \$ _____.

INSTRUCTIONS: Every registrant who fills in either statement No. 3 or No. 4 shall also fill in the statements numbered 5 through 8 in this series.

5. If any of my dependents (except my wife) are over 18 years of age, the reasons why they are dependent are as follows (list each person by name): _____

6. The following is a description of all property owned by (or held in trust for) either myself or my dependents (do not include clothing, personal effects, household furnishings, or automobiles, indicate which of such property is your home): _____

| Name of Person | Kind of Property | Value After Depreciation (Estimate) | Net Income From This Property (Past 12 Months) (If none, write "None") |
|----------------|------------------|-------------------------------------|--|
| | | \$ | \$ |
| | | | |
| | | | |

7. I _____ rent the house or apartment in which I live, if so, the monthly rent now is \$ _____.

8. I have contracted to purchase the following property (if none, write "None"):

| Kind of Property | Date of Contract | Balance Now Outstanding | Monthly Payments |
|------------------|------------------|-------------------------|------------------|
| | | \$ | \$ |
| | | | |
| | | | |

9. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are (if none, write "None") _____

INSTRUCTIONS: With respect to any dependent (other than the registrant's own wife or child) whose support the registrant has assumed, the registrant shall furnish to the Local Board an affidavit of the person for whom dependency is claimed (or from the person's guardian if he is incompetent) explaining when and under what circumstances the registrant assumed such person's support. Copies of Form 40-A for this purpose may be checked from the Local Board. If the dependent lives at a distance, do not delay return of the Questionnaire pending receipt of the affidavit; forward the affidavit as soon as received and it will then become a part of this Questionnaire.

Govt's Exhibit No. 2, Selective Service Questionnaire

Series VIII.—MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

INSTRUCTIONS.—Every registrant who is a minister or a student preparing for the ministry shall fill in the statements in this series that apply to him.

1. (a) I am a minister of religion. (b) I do customarily serve as a minister.
- (c) I have been a minister of the Methodist Episcopal Society since 7/1/1930.
- (d) I have been formally ordained. If so, my ordination was performed on 7/1/1930 by Methodist Episcopal Society at Dallas, Texas, Tex.
2. (a) I am not a student preparing for the ministry in a theological or divinity school.
- (b) I am attending the _____ which was established _____ September 16, 1939, and is located at _____.

Series IX.—CITIZENSHIP

INSTRUCTIONS.—Every registrant shall fill in the statements numbered 1, 2, 3, and 4 in this series.

1. I was born at Bozaly Penn. 4/1/18
2. I was born on April 1918
3. My race is: ☒ White; ☐ Negro; ☐ Oriental; ☐ Indian; ☐ Filipino; Other (specify) _____
4. I am a citizen of the United States.

INSTRUCTIONS.—Every registrant who is not a citizen of the United States shall fill in the statements numbered 5, 6, and 7.

5. I am not a citizen or subject of _____ My Alien Registration No. is _____
6. My permanent residence has been in the United States since _____
7. I have filed a declaration of intention to become a citizen of the United States (first papers). Declaration filed at _____ on _____ at _____ o'clock _____
8. I have filed a petition for naturalization (second papers). Petition filed at _____ on _____ at _____ o'clock _____

Series X.—CONSCIENTIOUS OBJECTION TO WAR

INSTRUCTIONS.—Only registrants who are conscientiously opposed to combatant or noncombatant military service by reason of their religious training and belief shall fill in this series, and shall obtain from the Local Board a special form (Form 47) on which to give substantiating evidence of conscientious objection. The Local Board after considering all other evidence of conscientious objection will determine whether the registrant shall be placed as a conscientious objector on the basis of the claim made and the information contained in the special form. Put "X" in applicable box or boxes.

1. By reason of religious training and belief, I am conscientiously opposed to participation in war in any form and therefore claim exemption from combatant training and service.
2. I am also, by reason of religious training and belief, conscientiously opposed to participation in noncombatant military service and request, in the event I am found to be conscientiously opposed thereto, that, in lieu of my induction into the land or naval forces of the United States, I be assigned to work of national importance under civilian direction, and I agree to perform such work and conform to all rules and directions made and given with reference thereto by the President of the United States or by such person as he may designate or appoint for such purpose pursuant to such rules and regulations as he may prescribe.

Series XI.—COURT RECORD (Confidential)

INSTRUCTIONS.—Every registrant shall fill in statement No. 1.

1. I am not been convicted of a crime.

INSTRUCTIONS.—Every registrant who has ever been convicted of a crime shall fill in statement No. 2 listing all convictions.

Govt's Exhibit No. 2, Selective Service Questionnaire

2 The kind of my convictions is as follows:

| OFFENSE | DATE (Month, Day, Year) | BY (Name and location) | SYSTEM |
|---------|----------------------------|---------------------------|--------|
| | | | |
| | | | |
| | | | |

3 I am now being retained in the custody of a court of criminal jurisdiction, or other civil authority.

Series XII — MILITARY SERVICE (Confidential)

INSTRUCTIONS — Every registrant who now is or has been a member of the armed forces of the United States shall fill in the statements in this series. (Use a separate line for each term of service.)

My military service has been as follows:

| ARM OF SERVICE (Army, Navy, National Guard, etc.) | DATE OF ENTRY INTO (Month, Day, Year) | EXPIRATION (Yes, No) | DATE OF DISCHARGE (Month, Day, Year) | TYPE OF DISCHARGE (Honorable, Dishonorable, Bad Conduct, Not Honorable, Unhonorable, or Other—Specify) |
|--|--|-------------------------|---|---|
| | | | | |
| | | | | |
| | | | | |

Series XIII — PRESENT MEMBERS OF ARMED FORCES, CERTAIN OFFICIALS, ETC.

INSTRUCTIONS — Every registrant who is a member of one or more of the groups named in this series shall check the appropriate item or items, and shall supply any further information called for under the item or items checked.

I am at present:

- 1 ☐ A commissioned officer, warrant officer, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, the Public Health Service, the federally recognized active National Guard, the Officers' Reserve Corps, the Regular Army Reserve, the Enlisted Reserve Corps, the Naval Reserve, the Marine Corps Reserve, or the Coast Guard Reserve; my rank or commission is _____ in the _____ (Name of service)
- 2 ☐ A cadet, United States Military Academy; midshipman, United States Naval Academy; cadet, United States Coast Guard Academy; man who has been accepted for admittance (commencing with the academic year next succeeding such acceptance) to the United States Military Academy as cadet, to the United States Naval Academy as midshipman, or to the United States Coast Guard Academy as cadet, and whose acceptance is still in effect; cadet of the advanced course, senior division, Reserve Officers' Training Corps or Naval Reserve Officers' Training Corps; I am _____ (A cadet, midshipman, or enlisted for admittance)
- 3 ☐ The Governor of a State or Territory, a member of a legislative body of the United States or of a State or Territory, a Judge of a court of record of the United States or of a State or Territory or the District of Columbia, my office is _____ (Name of office, academy, etc.)

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

INSTRUCTIONS — It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The Local Board is charged by law to determine the classification of the registrant on the basis of the facts before it, which should be taken fully into consideration regardless of whether or not this statement is filled in.

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class **4-D** (See Instruction 10a)

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the Local Board in determining his classification.

REGISTRANT'S AFFIDAVIT

INSTRUCTIONS — 1 Every registrant shall make the registrant's affidavit. 2 If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

State of Penn. COUNTY OF Westmoreland

I, Inds. 7 alio, do solemnly affirm that I am the registrant named and described in the foregoing statements in this Questionnaire, that I have read (or have

Govt's Exhibit No. 2, Selective Service Questionnaire

had read to and the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are in my own handwriting.

Registrant signs here W. H. H. H.

(Signature or mark of registrant)

Subscribed and sworn to before me this 23 day of Aug

1941

LOCAL BOARD NO. 11

WENTZ AND CO. INC.

121 E. 5th Street

WENTZ AND CO. INC.

WENTZ AND CO. INC.

If another person has assisted the registrant in filling out this Questionnaire, each person shall sign the following statement. I have assisted the registrant herein named in preparation of this Questionnaire because

(For example: Registrant unable to read and write English, etc.)

INSTRUCTIONS - Registrant shall write nothing below this line when filling out the Questionnaire

MINUTE OF ACTION ON REQUEST FOR EXTENSION OF TIME FOR FILING CLAIM OR PROOF

The application of W. H. H. H. is (granted) for the reason that to have time for filing claim or proof extended

(Date) 8-23-41 (Date)

MINUTE OF ACTION BY LOCAL BOARD

The Local Board classifies the registrant in Class 1 Subdivision 1 by the following vote: Yes 3 No 0

(Date) 8-23-41 (Date)

APPEAL TO BOARD OF APPEAL

I hereby appeal to the Board of Appeal from the determination of the Local Board

Jan 26-1942 (Date) W. H. H. H. (Signature of person appealing) W. H. H. H. (Relationship to registrant)

MINUTE OF ACTION BY BOARD OF APPEAL

The Board of Appeal classifies the registrant in Class 1 Subdivision 1 by the following vote: Yes 4 No 0 subject to question of conscientious objection - referred to Department of Justice this day.

(Date) Jan 26-1942 (Date)

APPEAL TO PRESIDENT

I hereby appeal to the President from the determination of the Board of Appeal

(Date) Jan 26-1942 (Date) (Relationship to registrant)

MINUTES OF OTHER ACTIONS

Date 1-19-42 Classified in Class 1-A as per Form 200.

(Date) 1-19-42 (Date)

Minute of Action by Board of Appeal

The Board of Appeal classifies the registrant in Class 1 Subdivision 1 by the following vote: Yes 4 No 0

subject to question of conscientious objection - referred to Department of Justice this day.

(Date) Jan 17 1942 (Date)

Reclassified in Class 4-B as per classification recommendation of the Appeal Board.

(Date) 1-19-42 (Date)

Reclassified in Class 4-F.

(Date) 1-19-42 (Date)

Government's Exhibit No. 3, Order to Report

Local Board No. 11 32
 Westmoreland County 129
 [redacted] 011
 107 South Second Street
 West Newton, Pa.

(Prepare Six Copies)

Ly. Lot 2 #3
 10/10/44
 J. H.

August 21, 1944
 (Date)

ORDER TO REPORT FOR WORK OF NATIONAL IMPORTANCE

THE PRESIDENT OF THE UNITED STATES.

TO [redacted] (Name)
 (Last Name)

Home address 227 Hill St., North Belle Vernon, Pennsylvania.

Order No. 222

CAPTION:

Having submitted yourself to a Local Board composed of your neighbors and having been classified under the provision of the Selective Training and Service Act of 1940 as a conscientious objector to both combatant and noncombatant military service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Civilian Public Service Camp #44, located at Big Flats, Channing County in the State of New York.

The Selective Service System will furnish you transportation to the camp, provided you first go to your Local Board named above and obtain the proper instructions and papers.

You will, therefore, report to the Local Board named above at 4 P.M. on the 2nd day of September, 1944.

You will be examined at the camp for communicable diseases and you will then be instructed as to your duties.

Willful failure to report promptly to this Local Board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940 and may subject you to a fine and imprisonment.

You must keep this form and take it with you when you report to your Local Board.

J. J. White
 Member of Local Board

Government's Exhibit No. 3, Order to Report

LOCAL BOARD INSTRUCTIONS

One copy of this form to be mailed by the Local Board to the assigned man when Local Board receives the *Assignment to Work of National Importance* (D. S. S. Form 49) from State Headquarters. Five copies to be mailed to the Camp Director when the man is entrained to camp.

INSTRUCTIONS FOR CAMP DIRECTOR

The Camp Director will fill the lines below; will then mail four copies to National Headquarters, Selective Service System, 21st and C Streets NW., Washington, D. C.; and retain one copy for camp file.

The registrant reported on the day of, 194.....

(Name and address of camp)

Camp Director

If the man does not report within 48 hours after date of assignment to camp, Camp Director must notify National Headquarters by air mail.

Deft's Ex. "A", Notice of Delinquency

Deft's Ex. "A"
12/1/42
JH

NOTICE (TO REGISTRANT) OF SUSPECTED DELINQUENCY

| | |
|-------------------------|-----|
| Local Board No. 11 | 11 |
| Westmoreland County | 129 |
| | 011 |
| 107 South Second Street | |
| West Newton, Pa. | |

To First (First) Second (Middle) Third (Last)

DEAR SIR:

According to information in possession of this Local Board, you have failed to perform the duty, or duties, imposed upon you under the selective service law as specified below.

☐ To present yourself for, and submit to, registration.

☒ To present himself for work of National Importance.

(Specify others)

You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 5 P. m., on the 8th day of September, 1942.

Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both.

J. J. White
 Member of Local Board.

This form shall be made out in triplicate. The original shall be sent to the suspected delinquent, the duplicate shall be sent to the Governor, and the triplicate shall be filed. (Selective Service Regulations, Volume Three, Classification and Selection.)

9-7-42

Deft's Ex. "B", Reply to Notice of Delinquency

"THIS ONE THING I DO"

• ADVERTISE •

THE THEOCRACY

Local Board #11
107 S. Second St.
West Newton, Pa.

Deft's Ex. "B"
12/1/42
H.T.

Nick Falbo
327 Hill Street
Belle Vernon, Pa.
September 8, 1942

To Whom it may concern,

Your notice of suspected delinquency states that I am directed to report, by mail, telegraph, or in person, at my own expense, to this Local Board, on or before 5 P.M. on the 8th day Sept. 1942.

This letter constitutes my means of reporting to the above Local Board. I request the Board to reconsider my case and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV-E. If the Board would have considered my case without discrimination they would have come to the true conclusion and classified me in IV-D.

I am a Minister of Almighty God and can not accept any other classification other than IV-D.

Nick Falbo

P.S. You are responsible to the Almighty God and in due time He will deal with you accordingly.

Deft's Ex. "C", Conscientious Objector's Form

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Order No. 2510

| | |
|------------------------|-----|
| LOCAL BOARD NO. 11 | |
| WESTMORELAND COUNTY | 32 |
| 107 S. Second Street | 129 |
| WES T HUNTSVILLE, ALA. | 911 |

Name Nick (First) (None) (Middle) Falbo (Last)
 Address 327 Hill St. (Number and street or R. F. D. route)
Bella Vernon (City, town, or village) Westm'd (County) Pa. (State)

This form must be returned on or before

Aug. 30, 1961

(Five days after date of mailing or issue)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Questionnaire.

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information only of the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the Local Board shall proceed in the ordinary course to classify him upon all other grounds of deferment, and shall consider and pass upon his claim as a conscientious objector only if, but for such claim, he would have been placed in Class I. The procedure for appeal from a decision of the Local Board on a claim for conscientious objection is provided for in the Selective Service Regulations. Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector. Provided, however, That the Local Board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either Statement A or Statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

A. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war. I am not willing to participate in any service or training therefor under the direction of military authorities.

B. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in any service which is under the direction of military authorities.

(Signature of registrant)

Nick Falbo
 (Signature of registrant)

Series II.—RELIGIOUS TRAINING AND BELIEFS

INSTRUCTIONS.—Every question in this series is to be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Describe the nature of your belief which is the basis of your claim made in Series I above.

Please refer to my Statement, Conscientious and
Neutrality booklet.

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

By studying the Bible and the Watchtower publications, such as the
Watchtower magazine, Consolation magazine, the book "Religion," "Salvation,"
"Riches," "Education," etc., and by attending Bible studies. In the year of
7/1/1930 through the Watchtower Bible & Tract Society.

Deft's Ex. "C", Conscientious Objector's Form

2. Give the name and present address of the individual upon whom you rely most for religious guidance.

The Holston Bible & Tract Society
117 Adams Street, Brooklyn, N. Y.

4. Under what circumstances, if any, do you believe in the use of force?

In my own personal defense.

3. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

*I have been arrested and served imprisonment in the county
 jail, Greensburg Pa., and in other places because of my
 faith and because of exercising my right to worship. I do not
 take dictation of my own conscience.*

4. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

No

Series III—GENERAL BACKGROUND

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this form.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, private, church, military, commercial, etc.).

| Name of School | Type of School | Location of School | Dates Attended | |
|-------------------------------|----------------|-----------------------------|----------------|-------------|
| | | | From | To |
| <i>Baggaley School</i> | <i>Public</i> | <i>Baggaley, Pa.</i> | <i>1921</i> | <i>1925</i> |
| <i>H. B. B. Turner School</i> | <i>Public</i> | <i>Greensburg, Pa.</i> | <i>1925</i> | <i>1929</i> |
| | | <i>H. B. B. Turner, Pa.</i> | <i>19</i> | <i>19</i> |

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged:

| Type of Work | Name of Employer | Address of Employer | Period Worked | |
|------------------------|-------------------|--------------------------------|---------------|-------------|
| | | | From | To |
| <i>Clayton Johnson</i> | <i>Harry Wolf</i> | <i>W. H. B. B. Turner, Pa.</i> | <i>1925</i> | <i>1929</i> |
| | | | <i>19</i> | <i>19</i> |
| | | | <i>19</i> | <i>19</i> |
| | | | <i>19</i> | <i>19</i> |
| | | | <i>19</i> | <i>19</i> |
| | | | <i>19</i> | <i>19</i> |

Deft's Ex. "C", Conscientious Objector's Form

3. Give all addresses and dates of residence where you have formerly lived:

| Name of City, Town, or Village | State or Foreign Country | Street Address or R. F. D. Route | Dates of Residence | |
|--------------------------------|--------------------------|----------------------------------|--------------------|------|
| | | | From | To |
| Baggaley | Pa. | House # 99 | 1915 | 1918 |
| | | | 19 | 19 |
| | | | 19 | 19 |
| | | | 19 | 19 |
| | | | 19 | 19 |
| | | | 19 | 19 |

4. Give the name, address, and country of birth of your parents and indicate whether they are living or not.

Mr. Ralph Faltz, Mrs. Rosamaria Faltz, born at Scrabble, Pa., and both are living.

PART IV—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No

2. Are you a member of a religious sect or organization? Yes If your answer to question 2 is yes, answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you:

(Jehovah's Witnesses) Watchtower Bible and Tract Society
117 Adams St. Brooklyn, N.Y.

(b) When, where, and how did you become a member of said sect or organization?

I became a member in 7/1/1931 in Monessen, Pa. by consecration, and by reading the Watchtower Publications.

(c) State the name and location of the church, congregation, or meeting where you customarily attend:

"Kingdom Hall" 220 Donner Ave. Monessen, Pa.

(d) Give the name and present address of the pastor or leader of such church, congregation, or meeting:

Angelo Galuppo, 411 Postville Ave. Monessen, Pa.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war:

Please refer to Consecration and Neutrality booklet.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious or military:

None

Deft's Ex. "C", Conscientious Objector's Form

Series V—REFERENCE

Give here the name and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war:

| Name | Full Address | Occupation or Position | Relationship to You |
|----------------|--|------------------------|---------------------|
| Carl V. Singer | 577 Broadview Ave. East Liverpool, Ohio | Zone Sergeant | None |
| Angelo Galuppo | 411 Northeast Ave. Warren & Company Detroit | | |

REGISTRANT'S AFFIDAVIT

INSTRUCTIONS.—The data made on this form will not be considered unless it is supported by the following affidavit. (If the registrant cannot read, the contents and his answers therein shall be read to him by the officer who administers the oath.)

STATE OF _____, COUNTY OF _____.

I, _____, do solemnly swear (or affirm) that I am the registrant described in the foregoing questions and answers, that I know the contents of my said answers, and that each and every statement of fact in my answers to said questions is true, to the best of my knowledge and belief.

(Registrant sign here)

Nick Galbo

(Signature or mark of registrant)

Subscribed and sworn to (or affirmed) before me this _____ day of _____, 19____.

(Signature of officer administering oath)

(Designation of officer)

If the registrant has received assistance from an advisor, the advisor shall sign the following statement:

I have assisted the registrant herein named in the preparation of this form.

(Signature of advisor)

(Address of advisor)

Deft's Ex. "C", Authorization Certificate

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY THAT Nick Falbo whose signature appears below, is an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and is therefore one of Jehovah's witnesses; that he is sent forth by this Society, which is created and organized and chartered by law to preach the gospel of God's kingdom, and that Jehovah's witnesses are commanded to obey God by preaching the gospel, which commandments appear in the Bible at Isaiah 61:1,2; Isaiah 43:9-12; Matthew 10:7,12; Matthew 24:14; Acts 20:20; 1 Peter 2:21; and 1 Corinthians 9:16; and that Jehovah's witnesses are compelled to obey God rather than men. (Acts 3:23; Acts 4:19; and Acts 5:29)

THAT in obedience to God's commandments Jehovah's witnesses preach the gospel and worship Almighty God by calling upon the people at their homes and exhibiting to them the message of said gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them.

THAT said witness of Jehovah is doing this work of bearing testimony before the people in strict accord with the fundamental law of the land and in obedience to God's law, which is supreme. Any kindness and consideration shown this witness of Jehovah will be greatly appreciated and is certain to call forth the blessing of the Lord upon the one showing such kindness. (Matthew 25:31-46)

WATCH TOWER BIBLE & TRACT SOCIETY

J. Rutherford President.

Name

Address

Nick Falbo
337 Hill St.
Belle Vernon, Pa.

Deft's Ex. "C", Reverse Side Authorization Certif'e

In these days of world distress all people need sound advice to guide them in the right way. Bible prophecies furnish that needed advice and The Watchtower publishes it for the benefit of the people.

Information concerning the importance of Christian instruction is set out fully in the book called Religion, and the distinction between religion and Christianity is there made plain. To read it means to get a great fund of useful information.

A special offer is being made during the next 30 days: A year's subscription for The Watchtower, meaning 24 issues, and the book Religion, on a \$1.00 contribution.

Defendant's Exhibit "C", "My Statement."

" MY STATEMENT "

#1

I ask the Draft Board to please read and consider "My Statement" in order that my stand be understood.

My occupation is, by God's Grace, solely that of an Ordained Minister of Almighty God, preaching the Gospel of His Kingdom and I am a true and sincere follower of Christ Jesus the son of Jehovah God.

I have been one of Jehovah's Witnesses for (11) years and have actively engaged in preaching the Gospel of God's Kingdom from house to house and from city to city.

I am recognized by the Watchtower Bible and Tract Society as a full time publisher known as a "PIONEER". If you will notice in Consolation #569 which I have handed in with my questionnaire, a list of full time publishers is given by the Society. The reason my name does not appear or is not listed in the said Consolation is for the reason that I had my name temporarily removed because of sickness but it has been re-entered since, and I have resumed in the PIONEER service.

My purpose and commission is to give testimony before the people of the world that Jehovah is the Almighty God and that His purpose is to set up in full operation "THE THEOCRACY", which shall rule the world in righteousness and bless the persons who are obedient to that Theocratic rule with life everlasting, peace, and happiness.

The Theocracy is the government of Jehovah God by and under the immediate direction of Christ Jesus the King. Being one of Jehovah's witnesses my commission and purpose is therefore to proclaim and transmit this vital information to all persons who will hear the testimony from God's word the Bible.

I have no power nor desire to compel anyone to hear or to join anything. I am merely a witness transmitting the message of Almighty God. All sincere persons devoted to Jehovah, who are in a covenant to do His will and who have been accepted by Him as such servants are ordained ministers of Almighty God; and since God ordains me, that is the highest ordination or authority that man could have, and such ordination is contained in the following specific rule of the Most High, as set forth in the Bible as to wit.

The spirit of the Lord God is upon me; because the Lord hath anointed me to preach good tidings unto the meek; He hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the Lord, and the day of vengeance of our God; to comfort all that mourn. (Isaiah 61: 1,2)

The Theocracy is the kingdom of Jehovah God, and this fact is stressed repeatedly in the testimony of Christ Jesus who is the Anointed King. At the time of His earthly ministry He said:

"The kingdom of heaven is at hand", meaning that Jesus himself, being appointed and anointed King by Jehovah, was then present.

His testimony, given over a period of more than three years, repeatedly emphasized the Kingdom of God as that which is of greatest importance to man because it is the means of man's salvation to life and the means of the vindication of Jehovah's great name.

Jesus continuously commanded all of His followers to pray for the coming of God's Kingdom, which will vindicate God's name and bless all obedient ones of men, and therefore He said: After this manner therefore pray ye: Our Father which art in heaven, Hallowed be thy name, Thy Kingdom come. Thy will be done in earth as it is done in heaven. etc. (Matthew 6:9,10)

(Continued on 2nd. sheet)

Back to 68 -11-

Defendant's Exhibit "C", "My Statement"

"MY STATEMENT"

#2

Should I as one of Jehovah's witnesses participate in wars between the nations of the world? How could one who is wholly devoted to ALMIGHTY GOD, and to His Kingdom under Christ Jesus, take sides in a war between nations, both of which are against God and His Kingdom? The answer is no, and the follow is given in support thereof.

Concerning such witnesses of the most High God it is written in the Bible: But ye are a chosen generation, a royal priesthood, an holy nation, a peculiar people; that ye should shew forth the praises of him who hath called you out of darkness into the marvellous light. (1 Peter 2:9)

No government of the earth is in favor of Jehovah's Kingdom under Christ, but all are against it. No government is advocating the establishment of God's kingdom of righteousness, and hence all are against that kingdom as Jesus declares; He that is not with me is against me. (Matthew 12:30) Also as recorded in (1 John 5: 19) "The whole world lies under the evil one."

It is the will of Almighty God Jehovah, and of His King Christ Jesus, that I shall not engage in war between the nations of the earth and that I am forbidden to so engage therein, the following is cited from the scriptures and which is addressed specifically to those consecrated persons who follow in the footsteps of Christ Jesus, to wit:

For though we walk in the flesh, we do not war after the flesh; for the weapons of our warfare are not carnal, but mighty through God to the pulling down of strong holds. (2Corinthians 10:3,4)

These commandments are given to all conscientious, faithful servants of Jehovah God: Keep yourselves unspotted from the world. (James 1:27) They are not of the world, even as I am not of the world. Sanctify them through thy truths: thy word is truth. (John 17:16,17) It is further stated in (John 15: 17-19) as follows:

I command you that ye love one another. If the world hateth you, ye know that it hated me before it hated you. If ye were of the world, the world would love his own; but because ye are not of the world, therefore the world hateth you.

I love not the world, neither the things that are in the world. If any man love the world, the love of the Father is not in him. (1John 2:15)

In order for one to prove his love for God and His Kingdom he must be a witness to Jehovah's name and His Kingdom in this day of great crisis in the world, as written:

Herein is our love made perfect, that we may have boldness in the day of judgment; because as he is, so are we in this world. There is no fear in love; but perfect love casteth out fear; because fear hath torment. He that feareth is not made perfect in love. (1John 4: 17, 18)

When Christ Jesus was on the earth he was entirely neutral toward all nations. He did not instruct his followers to take sides with any government or any nations of the earth in their controversies, but he emphatically instructed all his true followers to devote themselves entirely to God's Kingdom, Theocracy.

The footstep followers of Christ Jesus are designated in the Bible as "soldiers of Christ, and I being a servant of the most High God Jehovah, I am also considered, from the Bible standpoint, a soldier of Jesus Christ. It is recorded in (2 Timothy 2:3) as follows: Thou therefore endure hardness, as a good soldier of Jesus Christ. One who is a follower of Christ Jesus, and who believes that Jehovah is the Almighty God and that His Kingdom under Christ is the only hope of suffering humanity, and who believes that the Bible is the true word of God, should not and must not deviate from the Bible teaching to receive the blessing of Almighty God.

I therefore wish that the Board will carefully consider my stand and I ask for classification (4-A) for complete exemption.

Rich. Walter

Defendant's Exhibit "D", Certificate of Ordination

1st of Printing
Administration
224 COLUMBIA HEIGHTS
Publishing
517 ADAMS STREET



PHONE
TRIANGLE 3-1424
CABLE
WATCHTOWER
BROOKLYN

Def't's Ex. "D"
12/1/42
J.H.T.

SD-88

Oct. 7, 1941

TO WHOM IT MAY CONCERN.

This is to certify that Nick Falbo has been associated with the Watchtower Bible & Tract Society, Inc., according to our records, since 1931.

He was baptised in 1935 and was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory in 1941.

Mr. Falbo's entire time is devoted to missionary work. He has declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God. He has taken a course of study in the Bible and Bible helps prescribed by this Society and has shown himself apt to preach and teach "this Gospel of the Kingdom". Matthew 24:14.

He has the Scriptural ordination to preach "this Gospel of the Kingdom". Isaiah 61:1,2; Isaiah 52:7. He is, therefore, declared by this Society a duly ordained minister of the Gospel and is authorized to represent the Society and preach "this Gospel of the Kingdom", proclaiming the name of Jehovah God and Christ Jesus his King.

William B. D. [Signature]
W.B.D.
Vice-President

J. D. Sullivan
Superintendent of Evangelists

Subscribed and sworn to before me
this 7th day of October 1941.

[Signature]
Notary Public
New York City

Defendant's Exhibit "E", Letter of Appellant

Deft's Ex. "E"
12/1/42
JS

Nick Falbo
 327 Hill St.
 Belle Vernon, Pa.

To whom it may concern;

Please use no prejudice against me because of my faith and because I have chosen to serve Jehovah God.

I, Nick Falbo, have been one of Jehovah's Witnesses for about 12 years.

In July of 1940 I attended a convention of Jehovah's Witnesses at Detroit Mich. After returning home from the convention I enrolled as a PIONEER with the Watchtower Bible and Tract Society of Brooklyn N.Y. I continued in such work as a PIONEER from Sept. 1940 till the latter part of Jan. 1941. In the latter part of Jan. I became ill with Influenza and Liver trouble and remained ill till July of the same year. In August I regained some of my health and in that month I resumed my work as a PIONEER.

If you will note that the Consolation containing the list of ministers reporting to the above Society, was published in July 1941 during the time that I was ill, and for that reason my name did not appear in the said list. Since I have resumed my work my name has been added to the "Certified list of Pioneers" and forwarded to the Selective Service Headquarters.

During my illness I was treated by Dr. Gemmill of Belle Vernon, Pa. and by Dr. H.W. Daggs of 6916 Superior Ave., Cleveland, Ohio.

Because of my satisfactory work as a Minister I have since April 1st. been appointed by the Watchtower Society as a SPECIAL PIONEER. From the time I have been a Pioneer I have devoted at least 150 hours each month preaching from house to house as commanded for me to do in ACTS 20:20, and Matthew 24: 14. As a SPECIAL PIONEER I am devoting at least 175 hours in such work and also to conduct funerals and to give or make sermons at such cases. I am also the Study Conductor for the class of Christians gathering at Dodora, Pa.

I have received my ordination from Almighty God to be a Minister and also from the Watchtower Bible and Tract Society. I must continue to be a minister for God because I am a soldier for Jesus Christ as stated in 2 Timothy 2: 3,4. I have covenanted myself to God to do such ministerial work and must not permit anything to deviate me from such contract with Almighty God. Being that I am a soldier of Jesus Christ my weapons are not carnal but mighty through God to the pulling down of strong holds as recorded in 2 Corinthians 10:3,4.

The reason I have chosen to be a servant of Almighty God and a PIONEER is because I want to live a true Christian life as Christ Jesus did and his faithful followers, and because I want to devote my entire time in giving praise to the most high God as commanded in the Bible for all Christians to do.

I hope you have carefully considered my stand and place in class 4-B as a Minister of God.

Exhibit 1 new document
Manning Office

Nick Falbo

Defendant's Exhibit "F", Affidavit of John A. Poloney

Deft's Ex. "F"
12/2/42
147

Affidavit of John A. Poloney

City of Brownsville

County of Fayette

State of Pennsylvania

I, John A. Poloney, have known Nick Falto to be one of Jehovah's Witnesses for about five years. He has been a special representative of the Watchtower Bible and Tract Society, Inc. known as a pioneer since September 1, 1940. I know this because at that time I also was a pioneer and we worked together. He became ill in January of 1941, and being unable to continue he withdrew from that work temporarily. After he recovered from his illness he resumed his work as a pioneer and he is still in that work.

I also know him to be of excellent character.

John A. Poloney (Swd)

Subscribed to and sworn before me
this 15 day of Dec, 1942

Ima ...

NOTARY PUBLIC
MY COMMISSION EXPIRES
MARCH 16 1943

Exhibit 2
M. W. Ochs
Hearing Officer

Defendant's Exhibit "G", List of Signators

Def't's Ex. G
12/1/42 HT

Jehovah's Witnesses
320 Donner Ave.
Monessen, Pa.

We the undersigned do hereby acknowledge that
Nick Falbo, of 327 Hill St., Belle Vernon, Pa. has been
a Pioneer for the Watchtower Bible and Tract Society
since September, 1940.

| | |
|-------------------------------|--|
| <u>A. E. Sargent</u> | <u>215 Lockhart Ave. Charleston</u> |
| <u>Stephanie Saluppo</u> | <u>411 Rostrom St. Monaca Pa.</u> |
| <u>Mrs. Mary J. Saluppo</u> | <u>1106 - 2nd St. Monaca, Pa.</u> |
| <u>Samuel L. Crook</u> | <u>356 Cook St. Fayette City</u> |
| <u>Kathryn Warholie</u> | <u>443 Third St. Monaca, Pa.</u> |
| <u>Gerardine Francis</u> | <u>119 Luella Ave. Charlevoix</u> |
| <u>Anna Marie Sargent</u> | <u>315 Lockhart Ave. Charlevoix, Pa.</u> |
| <u>Mrs. Elizabeth Sargent</u> | <u>210 Lockhart Ave. Charlevoix, Pa.</u> |
| <u>Josephine Sargent</u> | <u>65 Allen St. Monaca</u> |
| <u>Martha Sargent</u> | <u>745 Washington Ave. Pa.</u> |
| <u>Charles Sargent</u> | <u>322 6th St. Monaca Pa.</u> |
| <u>Mary Sargent</u> | <u>65 Allen St. Monaca Pa.</u> |
| <u>Angela Saluppo</u> | <u>411 Rostrom St. Monaca Pa.</u> |
| <u>Kathryn Sargent</u> | <u>456 - 3rd St. Monaca Pa.</u> |
| <u>Peter Sargent</u> | <u>456 - 3rd St. Monaca Pa.</u> |
| <u>Mary Sargent</u> | <u>410 Highland Ave.</u> |
| <u>Nelson Sargent</u> | <u>412 S. 1st St. Monaca Pa.</u> |
| <u>Anna Sargent</u> | <u>Monaca Pa.</u> |
| <u>Nelson Sargent</u> | <u>513 Third St. Monaca Pa. - S.B.</u> |
| <u>Charles Sargent</u> | <u>968 Grant Ave. Monaca, Pa.</u> |

which 3
monaca
Hunting Office

Defendant's Exhibit "G", Affidavit of Galuppo

State of Pennsylvania,
County of Westmoreland, SS:

Personally appeared before me, a notary public, in and for said County and State, Angelo Galuppo, who being duly sworn according to law, doth depose and say; that he signed the within petition, and the same is true and correct as he believes.

Angelo Galuppo

Subscribed and sworn to before me this
18th day of May, 1942.

Marion L. Reamer
MARION L. REAMER, Notary Public
MY COMMISSION EXPIRES
FEBRUARY 20, 1945

Defendant's Exhibit "H", Statement of De Fazio

Deficit "H"
12/1/42 RT

Affidavit

Anthony De Fazio
 336 Broad Ave.
 Belle Vernon, Pa.

To whom it may concern:

I, Anthony De Fazio do hereby wish to testify that I have known Nick Falbo for about thirteen years. I have always known him to be a respectable and law abiding citizen. As one of Jehovah's Witnesses he has always been very much engrossed in his work of preaching the gospel and has never taken part in any worldly pleasures.

I know that for the past two years he has been a PIONEER for the Watchtower Bible and Tract Society of Brooklyn, N.Y.

I also want to add that I am not one of Jehovah's Witnesses.

Signed *Anthony De Fazio*

Sworn to and subscribed to before me, this day of May, 1942.

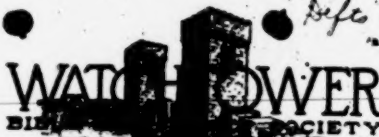
[Signature]
 Notary Public

NOTARY PUBLIC
 101 Chestnut Street
 Phila. 14, PA.

Exhibit 4
M. W. DeFazio
Notary Public

Defendant's Exhibit "I", Letter of Watchtower Society

OFFICES:
Administration
124 COLUMBIA HEIGHTS
Publishing
117 ADAMS STREET



PUBLISHING 117 ADAMS STREET BROOKLYN, N.Y.
May 21, 1942

PHONE
TRIANGLE 3-1424
CABLE
WATCHTOWER
BROOKLYN

Mr. E. W. Acheson,
United States Attorney,
1927 Oliver Building,
Pittsburgh, Pa.

Dear Sir:

Mr. Wick Falbo, 327 Hill Street, Belle Vernon, Pennsylvania, advises us that you requested of him to have us furnish you certain information concerning his standing with this Society.

Mr. Falbo has been associated with this Society, according to our records, since the year 1931 and became a full-time pioneer and direct representative in carrying on the work of preaching the gospel on September 1, 1940 and on his writing us in January 1941 that his health prevented his serving full time for a while, his name was removed from the full time list on January 29, 1941. On application subsequently to be reinstated on such full time list, he was duly appointed again and placed on our full time pioneer list on August 16, 1941. Our records further indicate that on April 16, 1942, he was promoted to special publisher pioneer. He was provided with ordination certificate showing that he was sent out by this Society some months ago and no doubt holds such certificate now, unless the same was filed with his questionnaire with the local board with which he registered.

Trusting that this is the information you required, we are,

Yours sincerely,

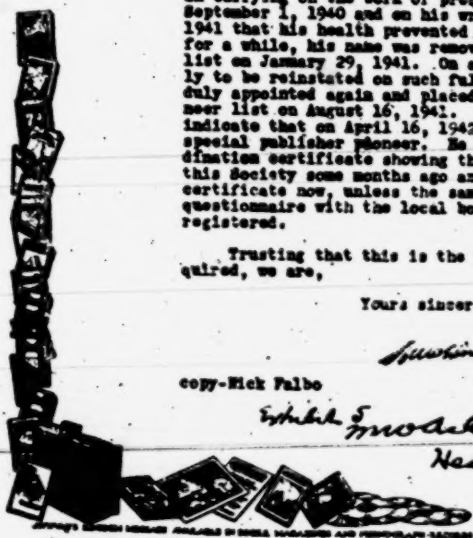
Spurgeon L. R. Jones, Sec.

copy-Wick Falbo

Exhibit 5 model 1000

Hessing M. M.

I found I would add my report a day or so, if he would be supply a certificate from the Society of his being a member. This was done 5/2/42



REPRODUCTION OF THIS DOCUMENT IS PROHIBITED BY FEDERAL LAWS AND REGULATIONS

Defendant's Exhibit "J", Affidavit of Appellant

Defts & J 14/1/42
 Affidavit of Nick Falbo

Page I

Before me the undersigned authority, on this day personally appeared Nick Falbo, who upon oath deposes and says:

I the undersigned, submit the following in support of my stand as a Minister of the Gospel and to prove to the court that I have not violated the Selective Service Laws.

On August 23, 1942 I received a notice from my local draft board that I was to report to a civilian public service camp. To such request I could not compromise because I have been improperly classified in class 4-E. The true and correct classification in which I should have been classified is 4-D because of my ministerial occupation. I have been denied such classification by the draft board. The board has stated that they took such action because my name did not appear in the certified list of pioneers.

The following is taken from the selective service regulations Vol. 3 paragraph 360 to show that the law does not require the name of a Minister to appear on a certified list in order for a Minister to be recognized as such by any local draft board:

CLASS IV-D: MINISTER OF RELIGION OR DIVINITY STUDENT.

- a. In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act (Sept. 16, 1940).
- b. A "regular minister of religion" is a man who customarily preaches and teaches the principles of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

The Watchtower Bible and Tract Society of which I am a member identifies its special representatives known as pioneers by a letter of ordination which is issued to all pioneers.

I have been one of Jehovah's Witnesses for over ten years. On September 1st, 1940 I became a full time minister known as a pioneer and continued as such until the latter part of January 1941 when I became ill with influenza. Because of such illness I had my name temporarily removed from the list of pioneers registered with the Watchtower Bible and Tract Society. During my illness I was treated by two Doctors who supplied me with certificates showing the length of time of my illness. These two certificates were forwarded to the draft board. On August of 1941 I resumed my work as a pioneer. Because of my illness is the reason why my name was not listed on the list of pioneers which was issued by the said Society on July 9, 1941 and not because I wasn't recognized as a minister by the Society. My letter of ordination states the amount of time that I have been recognized a minister. My letter of ordination which I was supplied with has also been given to the board and because they have improperly classified me it shows that the letter of ordination and my other documents have not been properly considered.

Continued on page 2.

Defendant's Exhibit "J", Affidavit of Appellant

2

My ordination as a minister is given me by the Watchtower Bible and Tract Society and from Almighty God as set forth in the Bible at Isaiah 61:1,2 Isaiah 43:9-12 Matthew 10:7-12 Matthew 24:14 Acts 20:20 I Peter 2:21 I Corinthians 9:16.

Since I have made a covenant with Almighty God I must obey His commandments which are superior to mans laws as set forth in Acts 5:29 Acts 4:19 Acts 5:29.

The Bible states that the whole world lies under the evil one Satan the Devil therefore I have chosen to be a soldier of Jesus Christ as recorded in II Timothy 2,3 as follows: "Thou therefore endure hardness as a good soldier of Jesus Christ."

The words of Jesus stated at John 17:16 concerning his followers are; "They are not of the world even as I am not of the world."

My duties as a minister are as brought forth in I Peter 2:9 which reads as follows; "Ye are a chosen generation, a royal priesthood, holy nation, a peculiar people; that ye should shew forth the praises of him who hath called you out of darkness into the marvellous light."

Being that I am a foot step follower of Christ Jesus and a minister of Jehovah God, I cannot compromise with anything either law or man that will cause me to deviate from my contract with Jehovah God.

Since the draft board has failed to classify me according to Selective service regulations it is now the duty of this court to render a correct decision and receive the approval of Almighty God.

Mark F. H. H.

Sworn to and subscribed to before me on this day of Sept. 9th 1962

JOSEPH VITTA, Notary Public

My Commission Expires

Joseph Vitta

Verdict of Jury

And now, to wit: December 1, 1942, we, the Jurors empaneled in the above-entitled case, find the Defendant Guilty.

(Signed) WILLIAM J. GRAHAM,
Foreman

Judgment and Commitment

On this 1st day of December, 1942, came the United States Attorney, and the defendant Nick Falbo appearing in proper person, and

by counsel and,

The defendant having been convicted on verdict of guilty of the offense charged in the indictment in the above-entitled cause, to wit:

Violation of Selective Training and Service Act of 1940 and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of

five (5) years - no fine - no costs.

IT IS FURTHER ORDERED that

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) F. P. SCHOONMAKER,
United States District Judge

The Court recommends commitment to

A True Copy: Certified this 1st day of December,
1942.

(By) I. C. STAUER,
Deputy Clerk

(Signed) G. H. BERGER,
Clerk.

This Appendix for the Appellant is hereby respectfully submitted.

P. K. JONES,
235 Broad Bldg.,
New Kensington, Pa.

VICTOR F. SCHMIDT,
Pine Road,
Rossmoyne, Ohio.
Attorneys for Appellant.

[fol. 82] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Of November Term, A. D. 1942.

Western District of Pennsylvania, ss:

The Grand Jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn and affirmed and charged at the term of said Court now pending, upon their oaths and solemn affirmations, respectively do present, that Nick Falbo hereinafter referred to as the defendant, late of said district, heretofore, to wit, on or about the fourth day of September, in the year of our Lord, one thousand nine hundred and forty-two, at West Newton, in the County of Westmoreland, in the Western District of Pennsylvania, and within the jurisdiction of this Court, having, in pursuance of the Selective Training and Service Act of 1940 become a registrant with Local Board No. 11, at West Newton, Westmoreland County, Pennsylvania, which said Local Board was fully appointed and acting for the area in which he, the said defendant, is a registrant, did unlawfully, knowingly, wilfully and feloniously fail and neglect to perform duties required of him under and in the execution of [fol. 83] the Selective Training and Service Act of 1940 and regulations passed pursuant thereto, that is to say, at the time and place aforesaid, said defendant, having been classified as a conscientious objector and having been placed in Class IV-E by Local Board No. 11, West Newton, Pennsylvania, pursuant to assignment to work of national importance as he, the said defendant, was ordered to do and as he was required by the provisions of the said Act and rules and regulations made pursuant thereto; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

Charles F. Uhl, United States Attorney.

[fol. 84] [Endorsed:] No. 11171 Crim. United States District Court, Western District of Pa., — Division. The United States of America vs. Nick Falbo. Indictment, Violation of Selective Training & Service Act of 1940. (1 count). A true bill, Wm. W. Reese, Foreman. Filed in open court this

12th day of November, A. D. 1942. G. H. Berger, Clerk.
Charles F. Uhl, U. S. Attorney.

Plea and Waiver of Counsel

The defendant, Nick Falbo, waives arraignment and pleads not guilty in open Court this Dec. 1, 1942 day of December, A. D. 1942.

Nick Falbo.

Defendant represented by Victor F. Schmidt, Atty.

[fol. 85] UNITED STATES DISTRICT COURT, WESTERN DISTRICT
OF PENNSYLVANIA, AT PITTSBURGH

Criminal Action

No. 11171

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

NICK FALBO, Defendant

Notice of Appeal to Circuit Court of Appeals

Name and Address of Appellant: Nick Falbo, 327 Hill Street, Belle Vernon, Pennsylvania.

Name and Address of Appellant's Attorney: Victor F. Schmidt, Pine Road, Rossmyrne, Ohio.

Offense: Failure to report for service in work of national importance under the Selective Service System when ordered so to do by the Local Board.

Date of Judgment: December 1, 1942.

Brief description of Judgment or Sentence: Five year confinement in a federal penitentiary.

Name of Prison where now confined, if not on bail: Allegheny County Jail, Pittsburgh, Pennsylvania.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Third Cir-

ent from the judgment above mentioned on the grounds set forth below.

(Signed) Nick Falbo, Appellant.

Dated: December 2, 1942.

Grounds of Appeal:

1. The trial court erred overruling the plea in abatement of the defendant to which ruling the defendant made timely exception.

2. The trial court erred in overruling the motion to dis-[fol. 86] miss of the defendant at the close of the plaintiff's case to which ruling the defendant made timely exception.

3. The trial court erred in his instruction to the jury that if defendant wished to question his classification by the Local Board he should have reported for service under the Selective Service System and thereafter instituted habeas corpus proceedings when the Local Board was arbitrary, unfair and denied him a hearing.

4. The trial court erred in his instructions to the jury when he asserted that the Court had no jurisdiction to review the actions of the Local Board when such was prejudicial, arbitrary, and denied defendant a hearing for his claim as a minister of religion.

5. The trial court erred in refusing to admit in evidence those things said and done when defendant tried to present his case before the Local Board and was refused by said board.

6. The trial court erred in refusing the defendant's tendered instruction to the jury that if from a consideration of all the evidence the defendant was a regular and duly ordained minister of religion at all times when he was under the jurisdiction of the Selective Service System then the jury should return a verdict for the defendant.

7. The trial court erred in refusing the defendant's instruction to the jury that if from all the evidence they found that the local board was prejudicial, unfair, and arbitrary, then they should return a verdict for the defendant.

(Signed) Victor F. Schmidt, Attorney for Appellant.

(Signed) P. K. Jones, Associate Counsel for Appellant.

[Endorsed:] United States District Court, Western District of Penn'a at Pittsburgh. No. 11171. Criminal Action. The United States of America, Plaintiff vs. Nick Falbo, Defendant. Notice of Appeal to Circuit Court of Appeals, Victor E. Schmidt, P. K. Jones, Attys. for Defendant. Filed Dec. 4, 1942. (Signed) G. H. Berger, Clerk.

[fol. 87] UNITED STATES DISTRICT COURT, WESTERN DISTRICT
OF PENNSYLVANIA, AT PITTSBURGH

Criminal Action

No. 11171

THE UNITED STATES OF AMERICA, Appellee,

vs.

NICK FALBO, Appellant,

On appeal to United States Circuit Court of Appeals for
Third Circuit, No. 8233

ASSIGNMENT OF ERRORS

Now comes the defendant, by his attorney, and says that in the proceeding herein held in the United States District Court for the Western District of Pennsylvania at Pittsburgh and in the orders and judgments entered by said Court there are manifest errors; to wit:

Assignment of Error No. 1

The Court erred in denying the plea in abatement on behalf of the defendant before evidence was produced and to which ruling of the Court the defendant took timely exception. The said Plea in Abatement is in letters and figures set out as follows:

UNITED STATES DISTRICT COURT, WESTERN DISTRICT (THIRD
CIRCUIT), AT PITTSBURGH

Criminal Action

No. 11171

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

NICK FALBO, Defendant

PLEA IN ABATEMENT

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Now comes Nick Falbo, the defendant in the above entitled course of action, and being duly sworn herewith presents his Plea in Abatement on facts extrinsic to the Indictment and record thus far in this case:

I. The defendant says that he has been a regular minister [fol. 88] of religion since 1931 and a "duly ordained minister" since Sept. 1, 1940 and this fact was made known to the Local Board at the time of filling out his questionnaire and also presented in his conscientious objector's affidavit. The Local Board, therefore, had no authorization to issue the order to report for work of national importance in a conscientious objectors' camp when Title 50 U. S. C. A. 305 (d) exempts from training and service (but not from registration) a regular or duly ordained minister of religion, which the defendant asserted himself to be at all times in the matters pertaining to this case.

II. The Court lacks jurisdiction by reason of the fact that the defendant had valid reasons for having failed to perform the duty required of him under the Selective Service System, to-wit:

(a) The Local Board in its administration failed to take necessary steps and violated Section 623.1 (c) of the Selective Service Regulations whereby the Defendant was wrongly classified and ordered to report,—and any judgment of this Court predicated upon such unwarranted jurisdiction and whereby the Defendant would be deprived of his

liberty is contrary to the First, Fifth, and Thirteenth Amendments to the United States Constitution.

(b) The jurisdictional basis of the present procedure as the evidence shows is predicated upon the acts and procedure of the Local Board which acted unfairly, arbitrarily and discriminatorily and capriciously in violation of the rights of and to the prejudice of the Defendant, contrary to Section 623.1 (c) of the Selective Service Regulations.

(c) The jurisdiction of this Court is based upon the procedure taken by the Local Board which has violated and omitted material steps prior to the order to report and contrary to the rules and regulations of the Selective Service System, and particularly Section 601.5 thereof.

The Defendant prays that the indictment be quashed.

The defendant reserves exception to any adverse ruling hereon.

(Signed) Nick Falbo.

[fol. 89] STATE OF PENNSYLVANIA,
County of Allegheny, ss:

The Defendant being duly sworn states that the above facts are true to his personal knowledge except those based upon information and belief and as to them he has reason to believe they are true.

(Signed) Nick Falbo.

Sworn and subscribed before me this 1st day of December, 1942.

(Signed) I. C. Stauer, U. S. Deputy Clerk.

AUTHORITIES:

Application of Greenberg, 39 Fed. Supp. 13.

St. Joseph Stock Yards Co., v. U. S., 298 U. S. 38, at 49 to 54.

Interstate Commerce Comm., v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91.

U. S. A. vs. Raise (1942), U. S. Circuit Court of Appeals for the Sixth Circuit.

Ver Mehren v. Sermyer, Commandant, etc., 36 Fed. 2d 976.

Ex parte Green, 123 Fed. 2d 862.

U. S. v. Nevin, 199 Fed. 831.

U. S. v. Greene, 113 Fed. 683.

U. S. v. Hammond, 26 Fed. Cases, No. 15,294.

Now December 1, 1942 Plea overruled.

Per Curiam, F. P. Schoonmaker, Judge.

The proceedings of the Court at the time of the presentation of the Plea in Abatement were as follows, as taken from pages 2 and 3 of the Transcript of Testimony:

Mr. Schmidt: The defendant at this time will present a plea in abatement. (Written plea presented).

The Court: Have you seen this plea, Mr. Mashank?

Mr. Mashank: Yes, I have a copy of it, Your Honor. And I feel it ought to be dismissed, for the reason the facts set forth here are not properly raised. It is not a matter for this court to determine. There is a procedure provided for the remedy he is asking for, under that case in the Circuit [fol. 90] Court of Appeals.

The Court: Do you admit the facts set out in this plea in abatement?

Mr. Mashank: No, Your Honor, we do not admit the facts.

The Court: The only fact that I see is his assertion that he is a regular minister of religion.

Mr. Mashank: And that is the fact that we do not admit. We say that matter has already been passed upon by the proper tribunal.

The Court: It is our view that the subject matter raised in this plea of abatement is a matter that should be raised before the regularly established Draft Board, and that that Board has the decision of whether or not this man is to be listed as he claims he should be. We therefore deny this plea in abatement.

Mr. Schmidt: The defendant respectfully excepts to the ruling of the Court.

Assignment of Error No. 2

The Court erred denying the written motion to dismiss on behalf of the defendant at the close of the evidence for the government to which ruling of the court the defendant took timely exception. The said written motion to dismiss is in letters and figures set out as follows:

[fol. 91] UNITED STATES DISTRICT COURT, WESTERN DISTRICT
(THIRD CIRCUIT)

At Pittsburgh

Criminal Action No. 11171

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

NICK FALBO, Defendant

MOTION TO DISMISS

Comes now the defendant in the above entitled case and moves the Court for an instructed verdict to dismiss the defendant for the following reasons:

(1) The trial court does not have jurisdiction of the subject matter involved in this case because the order for induction by the local Board under the Selective Service System was irregular and without authority in the instant case since regular or duly ordained ministers are exempt from induction according to Title 50 U. S. C. A. 305 (D) and such action of said Local Board was unfair and arbitrary as disclosed upon the record,—all of which is contrary to the First, Fifth, and Thirteenth Amendments to the United States Constitution.

(2) The evidence is insufficient to constitute a crime under the laws of the United States, because the uncontradicted evidence shows that the defendant at all times since his registration under the Selective Service Act to the present time has been a regular and a duly ordained minister of religion and the Local Board was unfair, arbitrary and discriminatory in the administration of the law contrary to Section 623.1 (c) of the Selective Service Regulations.

(3) The defendant is protected from the charge named in the indictment by specific exemptions stated in the law under which he is held, namely: Title 50, U. S. C. A. 305 (d) exempts from training and service (but not from registration) regular or duly ordained minister of religion. Furthermore, the application of the Selective Service Act according to Section 601.5 of the Selective Service Regulations, protects the defendant from performing the duty

charged in the indictment because he had a valid reason for having failed to perform said duty under the regulations.

The defendant reserves exception to any adverse ruling hereon.

(Signed) Victor F. Schmidt, Attorney for Defendant.
Address: Pine Road, Rossmoyne, Ohio.

December 1, 1942. Motion denied.

Per Curiam.

F. P. Schoonmaker, Judge.

[fol. 92]

AUTHORITIES

St. Joseph Stock Yards Co., v. U. S., 298 U. S. 38, at 49 to 54.

Interstate Commerce Comm., v. Louisville and Nashville Ry. Co., 227 U. S. 88, 91.

U. S. A. v. Raise (1942), U. S. Circuit Court of Appeals for the Sixth District.

Application of Greenberg, 39 Federal Sup. 13.

Ver Mehren v. Sermyer, Commandant, etc., 36 Federal 2nd., 976.

Ex parte Green, 123 Fed. 2nd., 862.

U. S. v. Greene, 113 Fed. 683.

U. S. v. Nevin, 199 Fed. 831.

U. S. v. Hammond, 26 Fed. Cases, No. 15,294.

The proceedings in the Court at the time of the presentation of the written motion to dismiss were as follows:

Mr. Schmidt: At this time the defendant files a motion to dismiss the action. (Written motion submitted).

The Court: Motion denied.

Mr. Schmidt: To which ruling of the Court the defendant respectfully excepts.

Assignment of Error No. 3

The Court erred in refusing to admit in evidence defendant's exhibit "C" which was the registrant's Conscientious Objector's form and including signed statement of the defendant and his authorization certificate. While said Conscientious Objector's form did not specifically apply for classification of that of a Minister yet the attended statement thereto specifically requested,—“I, therefore,

wish that the Board will carefully consider my stand and ask for classification (4D) for complete exemption." The authorization certificate appended to the Conscientious Objector's form and made a part thereto and included as a part of exhibit "C" asserts that Nick Falbo whose signature appears below is an ordained Minister of Jehovah God [fol. 93] to preach the Gospel of God's Kingdom under Christ Jesus and is therefore one of Jehovah's witnesses. Said authorization certificate was issued by the Watchtower Bible & Tract Society, Inc. and signed by J. F. Rutherford, President. The Conscientious Objector's form, "My Statement" and the authorization certificate all being included in exhibit "C" and being quite lengthy, the same are set out in full by photostatic reproduction in the list of exhibits to be reviewed by this Court. The same are also set out in the appendix of the Brief.

The proceedings in the Court at the time that exhibit "C" was presented and offered in evidence are as follows taken from pages 21, 22, 23 and 24 of the Transcript of Testimony:

Q. Is this the conscientious objector's form that you filled out (handing Defendant's Exhibit "C" to witness)?

A. It is.

Q. Marked Defendant's Exhibit "C". Is the handwriting therein your handwriting?

A. It is.

Q. And attached thereto, is that statement signed by you?

A. It is.

Q. And also appended and attached thereto is your authorization card. Does that bear your signature, in your own writing?

A. It does.

Mr. Schmidt: We offer Defendant's Exhibit "C" in evidence.

Mr. Mashank: If the Court please, I haven't any objection to the admission of this, provided it is limited to the [fol. 94] fact that this man claimed to be a conscientious objector, and that claim was respected by the Board and he was placed in Class 4-E. I think it should be limited to that purpose only.

Mr. Schmidt: If the Court please, it would rather be an injustice to the defendant to limit the conscientious objector's form to anything else than what appears on the face

thereof. We offer this in evidence for what it is, which includes the statement and the authorization card therein.

Mr. Mashank: We say that statement and authorization card does not mean anything, because it is not authenticated. We don't know what it is. It is only a printed card, no proof as to who signed it or had any authority to sign it.

The Court: As I understand it, you have no objection to this paper as being a claim for the privileges extended to conscientious objectors?

Mr. Mashank: That is right, Your Honor. In other words, he is claiming that he is a conscientious objector. We agree with him, and we have placed him in that classification, and that is all that paper is good for.

The Court: Yes, I would think that is the total of its evidential value, for what it purports to be on its face. I do not understand they offer it for any other purpose.

Mr. Schmidt: If Your Honor please, on its face you will note on the front page there that the applicant has crossed out the portion of the conscientious objector's application which requests him to be placed in the classification as a [fol. 95] conscientious objector; but this brings to the attention of the Appeal Board that he is a minister.

The Court: He says, "I claim exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religion, training and belief to the participation of war in any form and the participation in any service which may be under the direction of military authorities." I don't see any claim here that he presents that he is a minister of the gospel.

Mr. Mashank: Nothing in that document.

The Court: If it is offered for the purpose of showing that he is a minister of the gospel, it is clearly objectionable, because there is nothing in the paper that makes that claim.

Mr. Schmidt: We present it for the purpose, to let the instrument speak for what is on the face thereof. There is nothing—

The Court: If it is only for the limited purpose, the Government, as I understand it, makes no objection to your offering this for the purpose of showing that he is a conscientious objector.

Assignment of Error No. 4

The Court erred in refusing to admit in evidence defendant's Exhibit "D" when offered and an objection was made by the Assistant District Attorney and to which ruling of the Court the defendant took exception. Defendant's Exhibit "D" is a certificate of ordination issued by the Watchtower Bible & Tract Society, Inc. A photostatic copy of [fol. 96] this certificate is presented in the record as one of the very important Exhibits showing that the defendant-appellant has been a Minister since 1931. This Exhibit along with statement in his original questionnaire proves that he has been an ordained Minister since the year 1931. The proceedings that occurred in the Court at the time that the Defendant-appellant sought to introduce defendant's Exhibit "D" in evidence are as follows as taken from page 24 of the Transcript of Testimony:

Q. Furthermore, I will ask you: Can you explain to the Court and jury what this letter or affidavit marked Defendant's Exhibit "D" is?

Mr. Mashank: Wait just a minute. I believe he can identify an exhibit, but he cannot tell us what is in it.

Q. For the means of identification, what is Defendant's Exhibit "D"?

A. It is my certificate of ordination from the Watch Tower Bible and Tract Society, and issued to me as a minister.

Mr. Schmidt: The defendant offers this in as evidence.

Mr. Mashank: If the Court please, this is objected to, for the reason it has no bearing on any issue in this case. The facts set forth there have already been passed upon by the Board of Appeals and the Local Board, something that this Court cannot disturb.

The Court: We sustain the objection.

Mr. Schmidt: To which an exception is taken.

[fol. 97] Assignment of Error No. 5

The Court erred in refusing to admit in evidence defendant's Exhibit "I" which was a special letter sent by the Watchtower Bible & Tract Society, Inc., to Mr. M. W. Acheson, Hearing Officer, and which states that the Appellant herein is an ordained Minister of the Gospel. The photostatic copy of said Exhibit "I" is found on page 29 of the

Exhibits for the Defendant-Appellant. The proceedings in Court at the time when said Exhibit "I" was sought to be introduced are as follows:

Q. For the purposes of identification, will you kindly relate what Defendant's Exhibit "I" is?

A. That was a special letter sent by the Watch Tower Bible and Tract Society to Mr. M. W. Acheson, Hearing Officer, United States Attorney.

Mr. Schmidt: I present this as evidence in the case.

Mr. Mashank: I object to this, for the reason there is nothing in there to prove or disprove any issue in this case; and for the further reason that relates to questions already passed upon by the Board of Appeals and Local Board, and something that this Court cannot disturb.

The Court: We sustain the objection.

Q. Can you, in substance, briefly state what Defendant's Exhibit "H" is?—

Mr. Schmidt: Before entering that, the defendant reserves an exception to the ruling of the Court on the letter addressed by the Watch Tower Bible and Tract Society to Mr. Acheson.

Assignment of Error No. 6

The Court erred in refusing to admit in evidence defendant's Exhibits "E", "F", "G", and "H" which are set forth by photostatic copies in Appellant's Exhibit on pages 24, 25, 26, 27 and 28. The Court proceedings at the time of the presentation of these Exhibits for evidence is as follows:

Q. Will you now briefly state what are Defendant's Exhibits "E", "F", "G" and "H"?

A. These are affidavits which have been duly sworn to by members of Jehovah's Witnesses and other members that are not Jehovah's Witnesses but other religious sects, that they have recognized me as one of Jehovah's Witnesses and as a Pioneer Minister for the Watch Tower Bible and Tract Society.

Mr. Schmidt: And the defendant offers these as evidence.

Mr. Mashank: These are objected to, for the reason they are not the best evidence.

The Court: We sustain the objection.

Mr. Schmidt: To which an exception is respectfully taken.

Assignment of Error No. 7

The Court erred in refusing to admit in evidence Defendant's Exhibit "B" which is an explanation to the Local Board of the reason why the defendant did not report for service and which is set out in the record by means of photostatic copy on page 14 of Appellant's Exhibits. The Court proceedings at the time that the Exhibit No. 7 was offered in evidence are found on pages 26 and 27 and are as follows:

Q. Could you briefly state what Defendant's Exhibit "B" is?

A. It is an explanation to the Board—

Mr. Mashank: Just a minute. Don't tell us the contents [fol. 99] of that paper; just identify it.

A. (Continuing) 'It is a statement which I wrote to my Local Board, which I signed, concerning their letter of delinquency.

Mr. Schmidt: We offer this as evidence.

Mr. Mashank: We object to this, for the reason it is of no evidential value and it refers to matters that have already been passed upon by the hearing officer, the Board of Appeals and the Local Board, and something which this Court cannot pass upon.

The Court: We sustain the objection.

Mr. Schmidt: To which the defendant respectfully excepts.

Assignment of Error No. 8

The Court erred in refusing to admit in evidence defendant's Exhibit "J" which is the statement of the Defendant-Appellant made to the Agent of the Federal Bureau of Investigation. A photostatic copy of Defendant's Exhibit "J" is found on pages 30 and 31 of the Appellant's Exhibits. The Court proceedings at the time that the Exhibit "J" was offered is found on page 27 and 28 as follows:

Q. For the purpose of identification, what is Defendant's Exhibit "J"? Mr. Falbo?

A. This is my statement which I handed to the F. B. I. agent, which I spoke to here one time in this building in reference to my work.

Q. And is that signed—does that paper bear your signature?

A. It has my signature; and I also had this notarized.

Mr. Schmidt: Defendant offers this as evidence in this case.

[fol. 100] Mr. Mashank: This is objected to, for the reason it is a self-serving declaration, also contains conclusions, and also refers to matters that have already been passed upon by the Board of Appeals, the Hearing Officer and also the Local Board, and also a matter which cannot be disturbed by this Court.

The Court: We sustain the objection.

Assignment of Error No. 9

The Court erred in sustaining the objection to the following questions as found on page 28 of the record:

Q. Now, Mr. Falbo, when you made application for a hearing at your Local Board, did you go down there?

A. I did.

Q. And for the purpose of the record, would you mind relating just what took place?

After the objection was sustained by the Court the Defendant took exception and made an offer which is set out in full below.

The proceedings of the Court at the time of this presentation are found on pages 28 and 29 of the record and are as follows:

Q. Now, Mr. Falbo, when you made application for a hearing at your Local Board, did you go down there?

A. I did.

Q. And for the purpose of the record, would you mind relating just what took place?

Mr. Mashank: This is objected to, as being immaterial in this issue.

The Court: We sustain the objection.

[fol. 101] Mr. Schmidt: To which an exception is kindly taken. For the purposes of the record, in order that the reviewing court might determine, the witness will make the following proffer—

Mr. Mashank: You mean an offer?

Mr. Schmidt: Yes. (At side bar): When the defendant went down to the Board to have his hearing the Local Board

under which he was registered—four members were present, and when he announced that he was one of Jehovah's Witnesses one of the Board members, who is a minister, or purports to be, said "I do not have any damned use for Jehovah's Witnesses". He attempted to produce evidence by affidavits from the Watch Tower Bible and Tract Society and from his work that he had done, as well as the scriptural authority from the Bible, and the Board stated, "We have no time to listen to this", and he was dismissed.

Mr. Mashank: Objected to, as being immaterial and irrelevant.

The Court: We sustain the objection.

Mr. Schmidt: To which ruling the defendant respectfully excepts.

Assignment of Error No. 10

The Court erred specifically in his charge to the Jury in the following words taken from pages 38 and 39 of the record:

"Now, that classification by the Local Draft Board is binding upon this court and upon the jury. We cannot say whether the Board correctly classified this man. If he has any legal objection to the classification in which he is placed he could have that matter further determined by the court, by reporting to the Local Draft Board for classification, as required by the statute, and then presenting a [fol. 102] petition for a writ of habeas corpus to release him from that assignment; and, if that were true, then the Court, or the judge, would have to pass upon that question and determine whether or not he was properly classified as a conscientious objector instead of a minister of the gospel, as he claims to be. With that in this particular trial we have nothing to do. The Court and the jury must accept as a fact that he was classified in Class 4-E, as a conscientious objector. And then, if you find from the facts that he failed to report—and there is no evidence to the contrary, and even he himself admits it on the witness stand, that he did not report—it would be your duty to find him guilty."

The proceedings of the Court immediately following this statement of the Court are set forth in the record as follows:

Court: Have counsel on either side request for further or additional charges on any point?

Mr. Mashank: No, Your Honor.

The Court (continuing): Your verdict will be returned in written form, and on that form you will say whether you find the defendant guilty or not guilty.

Mr. Schmidt (at side bar): The defendant respectfully objects to that portion of the charge made by the Court in substance that if the defendant wanted to test the classification he should have reported and tested the classification by means of habeas corpus proceedings.

The second objection that the defendant takes to the charge is that the classification made by the Local Board or the Board of Appeals, whichever it might have been, is binding upon this court, the defendant holding that such would be the case where there is no prejudice and where a full and fair hearing is accorded to the defendant, but in this case such did not obtain.

[fol. 103] Assignment of Error No. 11

The Court erred in refusing the specific charges offered by the defendant for the consideration of the Jury and which are set out in the Transcript of Testimony on page 40 as follows:

The defendant offers the following specific charges to the jury: "If from all the facts in the case you find that the Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing, then you will return a verdict for the defendant.

"Second: If from all of the facts in the case you find that the defendant at all times during the course that he was under the jurisdiction of the Selective Service System has been a regular and or duly ordained minister of religion, and that the Local Board and Board of Appeals had knowledge of this from the evidence presented, then you will return a verdict for the defendant."

The Court: We decline to make the requested charges.

Mr. Schmidt: To which ruling of the Court the defendant respectfully excepts.

And by reason of said errors and other manifest errors appearing in the record herein the defendant prays that

the judgment of conviction be set aside and that he be discharged from custody.

Dated March 2, 1943.

Victor F. Schmidt, Attorney for Defendant-Appellant.

No. 11171, United States District Court, Western District of Pennsylvania. United States v. Nick Falbo. Assignments of Error.

[fol. 104] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942.

No. 8233.

UNITED STATES OF AMERICA

vs.

NICK FALBO, Appellant.

And afterwards, to wit, the 5th day of April, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument *sur* pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 6th day of May, 1943, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 105] IN THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942.

No. 8233.

UNITED STATES OF AMERICA

vs.

NICK FALBO, Appellant.

Appeal from the District Court of the United States
for the Western District of Pennsylvania

OPINION—Filed May 6, 1943

Before Biggs, Jones and Goodrich, Circuit Judges

Per CURIAM:

The judgment is affirmed upon the authority of United
States v. Grieme, 128 F. (2nd) 811.

A true Copy:

Teste:

— — —, Clerk of the United States Circuit Court
of Appeals for the Third Circuit.

[fol. 106] IN THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942.

No. 8233

UNITED STATES OF AMERICA

vs.

NICK FALBO, Appellant.

Present: Biggs, Jones and Goodrich, Circuit Judges.

On appeal from the District Court of the United States,
for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court.

John Biggs, Jr., Circuit Judge.

May 6, 1943.

Endorsements—Order Affirming Judgment. Received & Filed May 6, 1943.

Wm. P. Rowland, Clerk:

[fol. 107] UNITED STATES OF AMERICA
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States of America vs. Nick Falbo, appellant, No. 8233, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 24th day of May in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 108] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1942.

No. —

NICK FALBO, Petitioner,

vs.

UNITED STATES OF AMERICA

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. The appendix to the brief of the petitioner filed in the United States Circuit Court of Appeals for the Third Circuit.

2. The notice of appeal to the United States Circuit Court of Appeals as filed in the District Court on December 2, 1942, the indictment, assignment of errors and the proceedings of the United States Circuit Court of Appeals for the Third Circuit.

It is further stipulated and agreed that the petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Third Circuit to certify and file the entire transcript of the record now on file in his office with the Clerk of this Court, and that in the event the petition for a writ of certiorari is granted the record shall consist of the appendix for the appellant's brief as filed in the United States Circuit Court of Appeals for the Third Circuit (without further printing thereof), and indictment, notice of appeal, assignment of errors and the proceedings of the United States Circuit Court of Appeals for the Third Circuit (the latter four items to be printed to supplement said appendix for petitioner).

It is further stipulated and agreed that either party may refer in the petition and briefs to any portions of the certified typewritten transcript of record which are not in-

[fol. 109] eluded in the printed record to be filed in accordance with this Stipulation.

Charles Fahy (A. Q.), Solicitor General of the United States, Counsel for Respondent.. Victor F. Schmidt, Counsel for Petitioner.

Dated this 24th day of May, 1943.

[fol. 110] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 21, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7548)

FILE COPY
No. 1055 73

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

■
NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

■
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, AND BRIEF IN
SUPPORT THEREOF**

✓
✓ **HAYDEN C. COVINGTON
VICTOR F. SCHMIDT**
Attorneys for Petitioner

INDEX

SUBJECT INDEX

| | PAGE |
|--|-------|
| Summary Statement of Matters Involved..... | 1-9 |
| Preliminary Statement | 1-2 |
| Statutory Provision Sustaining Jurisdiction..... | 3 |
| Statute and Regulations Involved..... | 3-4 |
| Statement of the Case Showing How Questions, | |
| Arose Below | 4-9 |
| Opinions of the Courts Below | 9 |
| Questions Presented | 9-11 |
| Reasons Relied on for Allowance of Writ..... | 12-17 |
| SUPPORTING BRIEF | 18-36 |
| Specifications of Error | 18-19 |
| Argument | 19-27 |
| Conclusion | 28 |
| Appendix | 29-36 |

CASES CITED

| | PAGE |
|--|---------------|
| Atlantic C. L. v. North Carolina Corp. Com. | |
| 206 U. S. 1, 20 | 21 |
| Chin Yoh v. United States | |
| 208 U. S. 8, 13 | 21 |
| Crane v. State | |
| 5 Okla. Cr. 560 | 25 |
| Florida v. United States | |
| 292 U. S. 1, 12 | 2, 13, 21 |
| Goff v. United States | |
| C. C. A. 4.; Decided May 4, 1943..... | 13 |
| Interstate Commerce Commission v. Ill. Central | |
| 215 U. S. 452, 470 | 22 |
| Interstate Commerce Commission v. L. & N. Ry. | |
| 227 U. S. 88, 91 | 2, 13, 21 |
| Loh Wah Suey v. Backus | |
| 225 U. S. 460, 468 | 21 |
| Muser v. Magone | |
| 155 U. S. 240, 247 | 22 |
| Oregon Railroad v. Fairchild | |
| 224 U. S. 510 | 22 |
| People v. Kaye | |
| 212 N. Y. 407, 416 | 26 |
| Richter v. State | |
| 16 Wyo. 437 | 26 |
| St. Joseph Stock Yards Co. v. United States | |
| 298 U. S. 28, 49-54 | 2, 13, 21, 24 |

| | PAGE |
|---|-------------------------------------|
| Southern Pacific Co. v. I. C. C. 219 U. S. 433 | 22 |
| State v. Kirby 120 Iowa 26 | 25 |
| State v. Rachskowski 86 Conn. 677 | 25 |
| Tagg Bros. & Mooreland v. United States 280 U. S. 420, 444 | 2, 13, 21 |
| Tang Tun v. Edsell 223 U. S. 673, 681 | 21 |
| United States v. B. & O. S. W. Ry. 226 U. S. 14 | 21 |
| United States v. Di Lorenzo 45 F. Supp. 590 | 13, 25 |
| United States v. Grieme 128 F. 2d 811 | 2, 9, 14, 16, 23, 24, 26, 27, 29-36 |
| United States v. Newman 44 F. Supp. 817 | 24 |
| United States v. Sadlock 128 F. 2d 811 | 2, 16, 23, 24, 26, 27, 29-36 |
| Virginia Ry. Co. v. United States 272 U. S. 658, 663 | 2, 13, 21 |
| Wisconsin M. & P. R. Co. v. Jacobson 179 U. S. 287, 301 | 22 |
| Zakonaite v. Wolf 226 U. S. 272 | 21 |

STATUTES CITED

| | PAGE |
|--|----------------------------|
| Selective Service Regulations | |
| Section 601.5 | 3, 6 |
| Section 622.44 (b) and (c) | 4 |
| Section 623.1 (c) | 3, 6 |
| Selective Training and Service Act | |
| Section 5 (d) | 3, 4, 11 |
| Section 11 | 23 |
| United States Code | |
| Title 28, Sec. 347 (a) [Judicial Code, Sec. 240 (a)] | 3, 17, 28 |
| Title 50, Sec. 305 (d) | 3, 4, 6, 11, 20 |
| United States Constitution | |
| Amendment V | 11, 15, 16; 19, 21, 26 |
| Amendment VI | 11, 15, 16, 19, 21, 26, 27 |
| Amendment XIV | 11 |
| United States Supreme Court, Rules of | |
| Rule 38, par. 5 | 17, 28 |

MISCELLANEOUS CITATIONS

| | |
|--|----|
| BELL, United States District Judge, Minn. | 25 |
| BIBLE: Exodus 22: 2 | 14 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

■
NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

■
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

To the Supreme Court of the United States:

The above named petitioner presents this his petition for Writ of Certiorari and shows unto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. Preliminary Statement.

This is one of the cases arising under the Selective Training and Service Act of 1940. There is no disposition to criticize the law as it is but the contention herein is the mal-administration of the provisions of the Act and of the Selective Service Regulations authorized under said Act. Many times this Court has spoken with no

uncertain terms that in civil actions wherein administrative boards have acted unfairly, arbitrarily and capriciously that such actions are reviewable by the courts (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 28, 49 to 54; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Mooreland v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12) and in many other instances. Those cases of civil actions involved monetary liability. On the other hand the criminal actions under the Selective Training and Service Act of 1940 involve the life and liberty of the individual. The Constitution of the United States in the Fifth and Sixth Amendments thereof provide specific and cautious protection relative to criminal cases; and the same principle of judicial review should apply with greater force in criminal cases than to those involving monetary interests only.

While it is true that during the past year a strange and novel branch has been grafted on to the otherwise just and equal tree of American criminal jurisprudence in the cases of *United States v. Grieme* and *United States v. Sadlock*, 128 Fed. 2d 811 [appearing in full as appendix hereto], and subsequent cases by which the defenses of the alleged defendant are practically all taken away from one who does not report for military service or work of national importance, yet the petitioner holds that such new theories are wrong and un-American. The various phases of the new problems have never been presented before the Supreme Court of the United States, and the growing anxiety and destructiveness already wrought as a result of this erroneous doctrine warrants early and careful consideration by this Court.

2. Statutory Provisions Sustaining Jurisdiction.

Section 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) sustains jurisdiction of this Court.

3. Statute and Regulations Involved.

The particular section of the Selective Training and Service Act of 1940 that is involved in this case is Section 5 (d), or Section 305 (d) of U. S. C. A. Title 50 reading as follows:

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this act."

Section 601.5 of the Selective Service Regulations is as follows:

"Delinquent. A 'delinquent' is (1) any man required under the selective service law and directions given pursuant thereto to present himself for and submit to registration on a certain day fixed by the President who fails to so present himself for and submit to registration on that day and has no valid reason for having failed to perform that duty; or (2) any registrant who, prior to his induction into the military service, fails to perform, at the required time or within the allowed period of given time, any duty imposed upon him by the selective service law and directions given pursuant thereto and has no valid reason for having failed to perform that duty."

Section 623.1 (c) of the Selective Service Regulations provides the following:

"In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice."

4. Statement of the Case Showing How Questions Arose Below.

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania on November 12, 1942, on the charge of failure and neglect to perform duties assigned to him in work of national importance under the Selective Training and Service Act of 1940.

Petitioner had been a regular and duly ordained "minister of religion" in full compliance with Title 50 U. S. C. A. 305 (d) [Selective Training and Service Act, Section 5 (d)] and with Section 622.44 (b) and (c) of the Selective Service Regulations, since July 1, 1930. Petitioner at all times from the date of his registration to the time of his conviction at trial on December 1, 1942, was engaged as a full time minister of the Gospel and did no other work and was so ordained and authorized by the Watch Tower Bible and Tract Society of Brooklyn, New York (Transcript of Testimony, pp. 11 and 12). The facts concerning petitioner's ministry were originally stated in his questionnaire and which was duly filed with his Selective Service Local Board No. 11 for Westmoreland County, Pennsylvania.

Petitioner registered with his Local Board on October 16, 1940 (T. T., p. 4). He duly executed and returned his questionnaire to said Local Board on August 23, 1941, in which he asserted that he had been a duly

ordained minister since July 1, 1930 (T. T. 5, 12). The registrant was classified in Tentative 1 on September 25, 1941. While this classification did not affect his standing with respect to the Selective Service System it was one of the requirements for physical examination. When he appealed the Tentative 1 classification on January 26, 1942, he was placed in class 1A by the Appeal Board. Thereafter on January 17, 1942, he was placed in Class 4E as a conscientious objector, although he had asked on his questionnaire and repeatedly thereafter to be considered and classified as a regular and duly ordained minister of the Gospel and placed in Class 4D (T. T. 6).

Subsequent to his filing of his questionnaire petitioner attempted to have a personal hearing before the Local Board for the purpose of presenting additional evidence. When he presented himself before the board one of its members said, "I do not have any damned use for Jehovah's witnesses." He immediately thereafter attempted to produce affidavits from the Watch Tower Bible and Tract Society and from his work that he had done, as well as the Scriptural authority, and when he did this the board stated, "We have no time to listen to this" and he was dismissed (T. T. 28-29).

Although petitioner tried to present additional evidence material to his classification for the consideration of the Local Board and the Board of Appeals, yet he was prevented from so doing, and neither the Local Board nor the Board of Appeals had before it all the evidence in his case. The action by the Board of Appeals could not in any manner cure wanton defects caused by the unfairness and capriciousness of the Local Board, when the Board of Appeals also was prevented from having all the facts in the case and from obtaining such facts because of the prejudice of the Local Board toward petitioner.

On the day of the trial and before any evidence was produced the petitioner herein presented a Plea in Abatement in which were presented the facts in brief fashion of the ministerial status of the defendant for many years prior to the enactment of the Selective Training and Service Act of 1940 and that he was a "minister of religion" at all times since his registration and nothing else. In the Plea in Abatement the Federal Law, Title 50 U. S. C. A. 305 (d) which exempts ministers from training and service but not registration under the Selective Service System was explained to the District Court.

Section 601.5 of the Selective Service Regulations was pointed out to the District Court and which section defines a delinquent under the Act as any registrant who prior to his induction into the military service fails to perform within the required time any duty imposed upon him by the selective service law and directions given pursuant thereto and has no valid reason for having failed to perform that duty. While it is true that petitioner did not report for work of national importance, under the definition of delinquency he had a valid reason for having failed to perform that duty, and that exemption from duty was specifically authorized by the act of Congress.

Section 623.1 of the Regulations which places a duty upon the Local Board to use no discrimination for or against a registrant for race, creed or color, or because of his membership or activity in labor, in politics, religion or other fields. Each registrant shall receive equal and fair justice. This section was grossly violated by uncontradicted evidence that the Board had "no damned use for Jehovah's witnesses" and that it refused to give him any consideration when he personally appeared before the board for hearing. All of details of defense

presented in these last three paragraphs were contained in the Plea in Abatement whereby the trial court was appraised of the line of proof that the defendant proposed to offer, and in and by which the jurisdiction of the trial court was questioned and the efficacy of the indictment was called into question. The Plea in Abatement was overruled to the prejudice of the defendant (Transcript of Testimony, pages 2 and 3).

The Written Motion to Dismiss raised all of the objections to maintaining the cause of action that were originally presented by the Plea in Abatement and in addition thereto attacked the sufficiency of the evidence presented (T. T. 17).

During the trial petitioner tried to introduce as evidence the undisputed facts of his ministry and the matter of the unfairness and capriciousness of the Local Board in denying him a fair and impartial hearing, but he was repeatedly prevented from doing so. The trial court being decidedly of the opinion that the only question at issue was whether or not the registrant reported for service after he had been notified, ruled out all attempts in offers and tenders whereby the Local Board was arbitrary and unfair in its dealing with and classification of the petitioner, to all of which petitioner at the time excepted (Transcript of Testimony, pages 24, 25, 26, 27, 39 and 40).

Petitioner at the time of the trial duly made specific objections to the charge of the Court to the jury, specifically that statement of the Court that if the registrant wished to test the classification of the Local Board he should have reported for service and made a test by means of habeas corpus proceedings (Transcript of Testimony 39).

Petitioner made a second special objection to the general charge of the Court to the jury in that said charge asserted that the classification made by the Local Board and the Board of Appeals is binding upon the trial court. This objection was made on the basis that there was great arbitrariness on the part of the Local Board and due to the fact that petitioner was denied a fair hearing before said Local Board (T. T. 39).

Petitioner offered the two following specific charges to the jury which were declined by the Court and to which the defendant respectfully excepted at the time:

1. If from all the facts in the case you find that the Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing, then you will return a verdict for the defendant.
2. If from all the facts in the case you find that the defendant at all times during the time that he was under the jurisdiction of the Selective Service System has been a regular and/or duly ordained minister of religion and that the Local Board and the Board of Appeals had knowledge of this from the evidence presented, then you will return a verdict for the defendant.

Clearly the refusal of the Court to make the requested charges before the jury retired for consideration was grave error and denied petitioner the right of due process of law. He entered his timely exceptions to the refusal of the Court to grant these special charges.

On the same day the jury returned a verdict of "guilty". Thereafter and before the sentence was pronounced upon petitioner, he made a statement before the

Court which is found on pages 41 to 47, inclusive, of the Transcript of Testimony. The Court sentenced him by committing him to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. From the verdict of the jury and the judgment of the Court appeal was duly taken to the Circuit Court of Appeals for the Third Circuit at Philadelphia.

5. Opinions of the Courts Below.

No written opinion or otherwise was rendered by the United States District Court for the Western District of Pennsylvania at Pittsburgh except such as was expressed at various times during the course of the trial, in the Court's charge to the jury and the Court's remarks during the defendant's statement, all on December 1, 1942. All of the remarks by the Court are found in the Transcript of Testimony which is part of the record in the instant case and in the Appendix for the Appellant. The opinion of the Circuit Court of Appeals for the Third Circuit was given on May 6, 1943, and affirmed the judgment of the trial court on the basis of *United States v. Grieme*, 3 Cir., 128 Fed. 2d. 811, without comment.

B

Questions Presented

1. Can a district court deprive a defendant from asserting his rights under the Selective Training and Service Act by excluding from the record all evidence showing that the defendant was exempt from all kinds of service under the Act because he was an ordained "minister of religion"?

2. — Is a defendant in a case under the Selective Training and Service Act permitted to offer evidence showing he was not delinquent as charged in the indictment because he was an ordained minister exempt from the provisions of the Act and that the Local Board did not have jurisdiction to order him to report for induction?

3. Is the action of the Local Board subject to judicial review in a criminal action brought under the Selective Training and Service Act when evidence is offered to show that a fair hearing allowed by the Selective Service Regulations was denied the registrant?

4. Is the action of a Local Board subject to judicial review in a criminal action brought against a registrant under the Selective Training and Service Act where the evidence offered shows that the board was unfair, arbitrary and capricious in considering the classification of registrant?

5. In a criminal action brought under the Selective Training and Service Act, is a registrant confined solely to the issue of whether or not he reported for induction so as to exclude his defenses of confession and avoidance?

6. Is a registrant required to report for induction and submit to the military or other authorities under the Selective Training and Service Act and then resort to habeas corpus proceedings as his only remedy to question the arbitrary and capricious action of the Local Board under the Act?

7. Did the trial court commit reversible error in charging the jury that the only question involved was whether or not the defendant reported for induction over the objection and exception of the defendant?

8. Did the trial court commit reversible error in declining two charges timely requested by the defendant asking the jury to consider whether or not the Local Board had been prejudicial, unfair, arbitrary and capricious in rendering its classification?

9. Is a defendant precluded from offering proof in his behalf as a regular and duly ordained "minister of religion" when the Local Board denied him a fair hearing, prevented him from presenting evidence at the hearing, was arbitrary and capricious, when Title 50 U. S. C. A. 305 (d) [Selective Training and Service Act, Section 5(d)] exempts from training and service, but not from registration, a regular and duly ordained "minister of religion"?

10. Was the trial court justified in limiting the evidence to a consideration of whether or not the defendant reported for work of national importance under the Selective Service System when the Local Board denied him a hearing, prevented him from presenting material evidence that he was an ordained minister and by their statements and actions were unfair, arbitrary and capricious toward the defendant because he was one of Jehovah's witnesses?

The foregoing questions were seasonably and duly presented to the Courts below, put at issue matters relative to federal law, regulations, criminal procedure guaranteed by the Fifth and Sixth Amendments to the United States Constitution and involve an investigation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. These substantial federal questions are now presented to this Court for review.

C

Reasons Relied on for Allowance of Writ

The questions presented herein are of national importance and seriously affect the life and liberty of thousands of persons who are subjected in many instances to the unfair, arbitrary and capricious actions of Local Boards under the Selective Service System. While for the most part the boards created under the Selective Training and Service Act of 1940 are properly functioning in accordance with the law; there seems to be no practical means available at present whereby an innocent victim, who has valid and indisputable grounds for exemption, can assert a defense when he falls into the clutches of an unfair, arbitrary and capricious Local Board.

A new theory which has grown up in the past year, that the only defense a registrant may offer is whether or not he reported for induction regardless of the unfair and arbitrary action of the Local Board, has worked destruction to the long and established principles of criminal jurisprudence. The age-long and accepted principles of self-defense, confession and avoidance, arbitrary and capricious actions of administrative boards, exemption by law and justification are all flaunted and set aside.

Despite the many lower court decisions dealing with challenges to the arbitrary and unfair actions in isolated cases, both under the 1917 and the 1940 laws, there has been no decision by this Court indicating that their determination can be judicially scrutinized when said determination is tainted by unfair, arbitrary, capricious and foul action, nor has this Court determined by what procedure the unfair action of the erring draft board may

be called into question. This Court has repeatedly held that in civil actions the findings of administrative boards may justly be judicially reviewed when their conclusions are marked by unfair, arbitrary and capricious conduct, some of the many instances being *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 28, 49-54; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Mooreland v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12 and many others. Relief has been granted repeatedly by this Court when administrative boards had been unfair and capricious in their findings; and in those civil cases only monetary considerations were involved. Are we to say that in criminal cases relief is not allowed because the life and liberty of individuals are at stake? To hold to such a conclusion we must necessarily conclude that here in America during the past year 'the almighty dollar' has become more sacred than the life and liberty of the people.

The United States Circuit Courts are decidedly at variance with each other when several have suggested that, by *obiter dictum*, the action of the Local Boards may be subject to review when their conclusions are tainted with unfairness and arbitrariness (*Goff v. United States of America*, 4th Cir., May 4, 1943; *United States v. Di Lorenzo*, 45 F. Supp. 590). However, when the lower courts are confronted with a case which actually involves unfairness by which a registrant is denied a hearing and where the conclusions of the boards are tainted by capriciousness, as in the instant case, there is an evasion of the issues. The Circuit Court of Appeals for the Third Circuit in the instant case affirmed the judgment of the

trial court in a 'one sentence' opinion without explanation other than, it mentioned its own decision in the case of *United States v. Grieme, supra*. There is need for the Supreme Court to act on such a grave situation. Otherwise the people suffer, not because they have no defense, but because the local boards in some instances are capricious and unfair. Wrongs have been committed and there are no remedies.

The destructive effect on criminal jurisprudence is apparent when one is prevented from asserting a defense in a criminal action which he has in fact and by Act of Congress, and he is forced in the corner by the question, 'Did you report?' 'The Court is not caring whether the Local Board made a mistake or not, it matters not nor is it material whether the Local Board was arbitrary or unfair, their finding is conclusive.' The future of such criminal procedure is ominous,—no longer will it be asked whether the man took life in self-defense, but only whether the gun was fired. Under the new theory in cases of assault and battery with the multifarious crimes attended thereto, the question will never be asked 'Were you pushed into a corner?', or 'Were you provoked to commit the act when all other avenues of self-defense were taken away?' In cases of alleged rape the defense of consent and provocation will be removed. Even the laws of the Almighty God assure a man the privilege of self-defense and extenuating circumstances; for under the Mosaic law a man was justified in taking the life of the man who broke into the house of another with the purpose of committing mischief (Exodus 22:2). This new theory turns the law of God and man upside down.

A further effect of limiting the defense of a registrant to the issue of whether or not he reported for induction

or service is virtually to force him to plead 'guilty' and take from him the right of assistance by counsel. To disarm an individual of all his defenses except one, especially where the administrative board is unfair and capricious, and substitute the tyrannical power of the administrative body for law and order pursued in the ordinary avenues of court procedure is depriving the individual of property, liberty, and in some cases of life without due process of law. To place a defendant in a corner without any means of defense, save the answer to one question, and virtually to deprive him of the assistance of counsel when all legal remedies are closed is to go decidedly contrary to the letter and the spirit of the Fifth and Sixth Amendments to the Constitution of the United States. The framers of the Constitution never intended to substitute the dictatorial rule of man for the due process of law in any criminal action.

The course pursued during the past few months by many of the courts of the land is diametrically opposed to the protecting provisions for the defendant with respect to criminal actions as emphasized by the aforesaid Fifth and Sixth Amendments. The construction given those amendments must be in accord with the intention and contemplation of the law makers at the time of their adoption. When the founders of this Nation wrote the provisions relative to criminal law, there existed at that time no administrative boards to substitute their own whims for the law of the land; the spirit of totalitarianism and arbitrary oppression was entirely absent from consideration in criminal matters, and certainly the spirit of the Constitution sought to give new life to the rule of law, and for ever put to death the reign of tyranny.

Still another distasteful effect of limiting the defendant to the assertion of one issue, is that it practically deprives him of a trial. The meaning and contemplation of a 'trial' is that it embraces a presentation of all the material facts for the deliberation and consideration of the arbiter so that a judgment may be reached which is consonant with the law. The criminal law as intended by the framers of our Constitution embraces such a trial and anything short of just what is intended by the Federal Constitution is a decided violation of the due process clause of the Fifth Amendment. To deprive a defendant of his material defenses is to deny him of a fair and impartial trial.

Another error into which the Courts have fallen by following the *Grieme-Sadlock* Opinion [supra, and appearing as Appendix hereto] is that one must resort to habeas corpus proceedings before he can question the arbitrary and capricious manner of the Local Board or if the board denies the registrant a full and fair hearing. Right here it may be said that neither the Constitution of the United States nor the general law of criminal procedure has ever said before that one must give up his liberty, and maybe his life, before he would be granted the privilege of asserting his defenses. The price of a fair and impartial trial is not to be purchased at such a cost. What the Constitution of the United States grants as a right to a defendant in a criminal action no Court can burden. The Sixth Amendment to the Federal Constitution says that "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury"; it does not say that the 'accused may enjoy such right only after paying the price by giving up his liberty.' The conclusion of this point is 'there shall be no burden placed upon the right of a speedy and public trial.'

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under Section 240 (a) of the Judicial Code [28 U. S. C. A. paragraph 347 (a)] and Rule 38, paragraph 5 (b) of Rules of this Court.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the trial court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

NICK FALBO

Petitioner

By HAYDEN C. COVINGTON
VICTOR F. SCHMIDT

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPORTING BRIEF

Specifications of Error

The petitioner assigns the following errors in the record and proceedings of said cause:

The United States Circuit Court of Appeals for the Third Circuit committed fundamental error in affirming the judgment of the trial court because

- (1) Where the Act of Congress and Presidential Regulations specifically exempt a registrant from training and service no Local Board by unfair and arbitrary action can deprive a defendant from asserting his rights under said Acts and Regulations, and the exclusion of evidence asserting such rights of defense in a criminal action by the trial court is reversible error.

(2) The actions of a Local Board are subject to judicial review when it denies a registrant a hearing accorded him under the Regulations and when the actions of said Board are unfair, arbitrary and capricious, and the proceedings of the trial court preventing review under such circumstances are subject to reversible error.

(3) To confine the issue in a criminal case to whether or not the petitioner reported for service when the Local Board denied him a hearing and was arbitrary and capricious, and thereby excluding the defense of confession and avoidance, is a direct violation of the rights of trial and due process guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

(4) To force a registrant to resort to habeas corpus proceedings before he is entitled to assert the defense of confession and avoidance is placing an undue burden upon the right to a speedy and public trial and depriving a defendant of his liberty without due process of law, all contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

For each of the above reasons the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed.

Argument

The conviction of the petitioner by the trial court and the affirmance thereof by the Circuit Court of Appeals for the Third Circuit were a gross violation of the petitioner's rights and thwarted the plain intention of Congress. The act of Congress and the Presidential Regulations material to this case are detailed herein under

Section 3 of the Summary Statement of Matters Involved at page . Title 50 U. S. C. A. 305 (d) specifically provides that regular or duly ordained ministers of religion shall be exempt from training and service under the Selective Training and Service Act of 1940 but not from registration. The undisputed evidence revealed that the petitioner was a regular and duly ordained "minister of religion", being a pioneer minister of Jehovah's witnesses and the Watchtower Bible and Tract Society, and putting in his full time in that profession at all times that he was subject to the jurisdiction of the Selective Service System. Because he was operating as one of Jehovah's witnesses the Local Board took prejudicial exception to his being classified as a minister holding that it did not "have any damned use for Jehovah's witnesses" and when the petitioner attempted to produce evidence at the hearing before the board it said, "We have no time to listen to this," and he was dismissed.

The uncontroverted evidence in the case reveals that the petitioner was engaged as an ordained minister since July 1, 1930. He was recognized as such not only by Jehovah's witnesses but by individuals adhering to various denominations, both Catholic and Protestant. From the time that he filed his questionnaire to the time of his conviction he asserted his ministerial status and asked for classification as a minister, specifically stating that he desired a 4D classification; and it was only because of the arbitrary and capricious action of his Local Board that he was not given the proper classification. At the time of his trial the District Court at Pittsburgh refused to consider any other question than "whether he reported or not". It is apparent that the petitioner has been deprived of his liberty and rights without due process of

law,—all contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

This Supreme Court of the United States has laid down the rule that wherever an administrative body created by the legislature acts within the sphere of its authority in a fair and unprejudiced manner its findings are not subject to judicial review by the courts; but where a hearing has been denied, where the board has violated the rules specifically ordering its conduct, where the administrative body has acted unfairly, arbitrarily and capriciously and there is a deprivation of rights, either of person or property, the acts will be reviewed by the Court, and the judiciary will not be ousted by any legislative arrangement designed to preclude judicial determination. In this connection see specifically *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49 to 54; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Mooreland v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12.

This Court has repeatedly held that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; or if the finding was contrary to the 'indisputable character of the evidence'. In this connection see *Tang Tan v. Edsell*, 223 U. S. 673, 681; *Clin Yoh v. United States*, 208 U. S. 8, 13; *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *Zakonaite v. Wolf*, 226 U. S. 272. If the facts found do not, as a matter of law, support the order made, such order is void. *United States v. B. & O. S. W. Ry.*, 226 U. S. 14; *Atlantic O. L. v. North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin M. & P. R. Co. v. Jacob-*

son, 179 U. S. 287, 301; *Oregon Railroad v. Fairchild*, 224 U. S. 510; *I. C. C. v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co. v. Interstate Com. Comm.*, 219 U. S. 433; *Muser v. Magone*, 155 U. S. 240, 247.

If judicial review is proper in the courts when administrative boards have refused to grant a hearing, and inadequate hearing or have acted unfairly, arbitrarily and capriciously in matters respecting to civil matters, the same rule should logically apply with even greater force when the liberty, and maybe the life, of a defendant is involved in a criminal action. The Constitution of the United States is particularly solicitous with respect to guarding the rights of the individual charged in criminal actions lest grave injustices be perpetrated here in America once experienced under the yokes of European despots. Civil cases usually involve money and property liabilities; while criminal actions involve the liberty and life of individuals. Have we come to the position in this country when money and property considerations are at a greater premium than life and liberty?

The strange doctrine of limiting the defense of a person charged with crime to whether or not the act was committed has been unheard of in this country until very recently. It is not supported by the Constitution of the Nation, neither is it supported by the American system of criminal jurisprudence. The writers of the Fifth and Sixth Amendments to the Constitution of the United States never intended that the right of trial in a criminal action precluded the defense of confession and avoidance. The Constitutional guarantee of right to trial includes the right to present all material defenses; otherwise innocent persons would be deprived of their rights, liberties and life without due process of law. The right of

self-defense when all other available remedies have been taken away is sanctioned by both God and man, such a right is based on fundamental justice and any theory which seeks to overthrow this fundamental legal principle is certain to have a speedy end. Why wait to set aside this fundamental error? Why not remove it forever before the resultant devastation makes further inroads into criminal procedure?

This baneful doctrine of chiseling down the defenses of an individual is largely the result of the cases of *United States v. Grieme* and *United States v. Sadlock*, 3 Cir. 128 F. 2d 811, wherein it is provided that

"The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary manner are not defenses to a prosecution under the Act for a failure to comply with the board's order."

An examination of the Selective Training and Service Act of 1940, as amended, definitely reveals that the Courts have read into the Act something that is not there, the pertinent parts of the same stating:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . who in any manner shall knowingly fail or neglect to perform any duty, required of him under or in the execution of this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished." [St. & S Act, Sec. 11]

There is nothing here that warrants the limitation of the defense to the question of whether or not one failed

to perform an assigned duty. Even if the legislative fiat had so limited the defense to whether or not the act was committed, or had placed the stamp of finality upon the board's findings, such would not preclude judicial scrutiny when the board's actions were tainted with arbitrariness and when the petitioner herein was denied a hearing. On this very point see *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49-54.

The effect of permitting such a doctrine as announced in the *Grieme-Sadlock* cases, supra, to continue would be disastrous. It would only be the next step to deprive an innocent person of the right of self-defense by the statement 'we do not care if your life was threatened and you were helpless, the only question is whether or not you fired the shot at the burglar.' Under the *Grieme-Sadlock* decision in case of assault and battery or assault and the multifarious associated crimes one could not plead any extenuating circumstances, as 'he forced me into the corner, he provoked me to do the act, I retreated to the wall, or he had me down and was about to take my life with a dagger'; no the only question under the new theory would be, 'did you commit the act?' Such curtailment of defenses would multiply and encourage crimes of all kinds in the United States, and the penitentiaries in a fortnight would be bursting for want of capacity. Such a theory is downright unreasonable! The voice of criminal experience throws it out of our jurisprudence! It has no place in America!

Now, let us examine some of the decisions prior to that of *Grieme-Sadlock* that hewed to the line of sound jurisprudence. In *United States v. Newman*, 44 F. Supp. 817, Judge Lindley stated that on the same principles that control in applications for writs of habeas corpus the

defendant could in cases involving Selective Service raise the same defenses in a criminal case, namely "the question of whether the board had jurisdiction, whether there was a fair hearing, or whether the action taken was arbitrary or unlawful." In the case of *United States v. Di Lorenzo*, 45 F. Supp. 590, Judge Leahy said that "the federal district courts may disturb such findings only when it appears that the party involved has not been offered a 'full and fair hearing', or that the administrative officers have acted contrary to law, or have manifestly abused the discretion committed to them by the statutes." It is quite certain that the fact that the Local Board refused to hear the petitioner herein, and manifested malice because the registrant was a Jehovah's witness, would warrant judicial review in the criminal action. Judge Bell of the Minnesota District Court, in an article in the March, 1942, issue of the American Bar Association Journal, expressed the same opinion, "On principle, it would seem that the defendant should be permitted to offer as a defense (to an indictment) the same questions that he could present in a habeas corpus proceeding, that is . . . whether the action of the board was arbitrary or unlawful."

The state courts have reached similar conclusions with respect to the principles of criminal procedure involving the arbitrary actions of administrative boards. The nearest cases are those growing out of quarantines, both of humans and of animals. In *State v. Rachskowski*, 86 Conn. 677, a woman was convicted for violation of a quarantine order. She urged that there was no basis for the order since there was no ground for reasonable belief on the part of the authorities that she was infected with a contagious disease. Her right to urge this objection to the

order was sustained and her conviction reversed. See also *State v. Kirby*, 120 Iowa 26; *Crane v. State*, 5 Okla. Cr. 560; *Richter v. State*, 16 Wyo. 437, and *People v. Kaye*, 212 N. Y. 407 at 416.

To compel a person to resort to habeas corpus proceedings before he can present his defenses is a subterfuge whereby the purpose of the Constitutional guarantees are defeated. The writers of the Constitution never dreamed of the necessity of giving up one's liberty before he would be entitled to a speedy and public trial. This added burden asserted without any supporting authority in the *Grieme-Sadlock* opinion is an uncalled for parasite which is sure to choke the otherwise just system of criminal procedure. Many times this court has frowned upon burdens upon, subterfuges to circumvent and repressive measures against the rights of the people. We must remember that the Fifth and Sixth Amendments to the Federal Constitution embrace some of the restrictions upon the Federal Government, and these regulations are binding upon the judiciary thereof. When the Federal Courts, as in the *Grieme-Sadlock* opinion, seek to circumvent the rights of the citizen to a speedy and public trial and to burden the procedure outlined in the Constitution, such new and fantastic judicial theories must be put to an end as soon as possible.

The effect of subjecting one's self to induction into the army or into national service before one could assert the right of asserting the defenses sanctioned by the Act of Congress is an undue hardship. Under habeas corpus proceedings the petitioner must bring the action in the place where he is held in custody or where his superior officer is located. This place of custody may be hundreds of miles away and there would be great hardship in insti-

tuting action far removed from the state and district of the local board and the witnesses upon whom the defendant might rely. If the individual were transported to foreign shores, the privilege of asserting any of the defenses would be absolutely taken away.

But there is still a more vulnerable defect in this substitution of habeas corpus procedure for the criminal action guaranteed by the Federal Constitution. If habeas corpus were substituted for criminal action the benefits and rights secured thereby should be just as sure, certain and complete as those afforded by those rights already detailed in the Sixth Amendment to the United States Constitution. It is one of the requisites of obtaining a writ of habeas corpus, that the action must be maintained in the district and state where the prisoner or relator is held. This must mean in the district where the superior officer has charge of the relator. This may be outside of the state and district where the alleged offense is claimed and far removed from the draft board who is responsible for the miscarriage of justice. Now let us note that the Sixth Amendment provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." To force the transfer of the locus of the trial wherein the relator may offer his defenses to another district is absolutely taking away the rights guaranteed by the Sixth Amendment to the Constitution.

The whole theory advanced by the *Grieme-Sadlock* decision is so honeycombed with defects that it should be thrown by the wayside immediately and without any hesitancy.

Conclusion

For the reasons presented above (1) that the Local Board was prejudiced against the petitioner in that it denied him a hearing and was arbitrary because he was one of Jehovah's witnesses, (2) that an administrative board's findings should be subject to judicial review in a criminal action when its conclusion is tainted with unfairness and capriciousness, (3) that fundamental principles of justice are violated by depriving one of defenses intended by Congress and the Presidential Regulations, (4) that the age-established principles of confession of avoidance and defense have been violated as shown by the record in this case, and (5) that compelling the petitioner to resort of habeas corpus proceedings before he could assert his defenses is entirely unconstitutional and violative of common sense and justice, there is here presented a case calling for urgent action by the powers of this Court in accordance with Section 240 (a) of the Judicial Code [28 U. S. C. A. paragraph 347 (a)] and Rule 38, paragraph 5 (b), Rules of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of here and committed by the court below against the petitioner.

Respectfully submitted,

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT

Attorneys for Petitioner

Appendix

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 7967 October Term 1941
[128 F. 2d 811]

UNITED STATES OF AMERICA

v.

EDWARD JOHN GRIEME,
Defendant-Appellant.

No. 7968 October Term 1941

UNITED STATES OF AMERICA

v.

ALBERT SADLOCK,
Defendant-Appellant.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY.

OPINION

(Filed June 9, 1942)

Before BIGGS, JONES and GOODRICH, *Circuit Judges.*

JONES, *Circuit Judge.*

The appellants, who were indicted and tried separately, were each convicted of a willful violation of Sec. 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. (Appendix) §311).¹ Each has appealed from the respective judgments of sentence entered by the court below upon the several verdicts. As both cases present substantially similar facts and as the questions of law raised by the appellants are identical, the appeals were consolidated, on motion, by order of this court and will be disposed of in one opinion. Fundamentally, the question involved is whether a registrant under the Selective Service Act, who has deliberately refused to obey his draft board's order of induction, may defend to a charge of willfully violating the Act by showing that the board erred in classifying him.

Each of the appellants, both of whom are members of the religious sect known as Jehovah's Witnesses registered under the Selective Service Act. Each filled out a questionnaire which he filed with his local draft board. Therein he set forth his membership in the religious sect which, as he averred, had ordained him as a minister for the purpose of expounding the sect's beliefs and distributing its tracts and pamphlets. He accordingly claimed exemption as a minister of religion and sought classification as such under IV-D. Each of the registrants

¹ Sec. 11 of the Selective Training and Service Act of 1940 provides in material part as follows:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished * * *"

also filled out and filed with his draft board the form provided for those claiming classification under IV-E as conscientious objectors. The draft board duly classified each of the registrants as a conscientious objector under class IV-E and sent them notices to that effect. Requests for reclassification as ministers of religion under IV-D having been refused by the local draft board, each of the registrants appealed to the county board of appeals, which sustained the action of the local draft board. Thereupon each of the registrants wrote to the office of the Director of the National Headquarters of the Selective Service System at Washington, D. C., seeking reclassification in accordance with his claim for exemption. Nothing more was done by National Headquarters with these letters than to transmit to the local draft board the registrant Sadlock's letter. In due course, the local draft board, continuing to find that the registrants were not entitled to classification as ministers of religion, sent each a notice to appear on a day certain for induction as a conscientious objector for the performance of work of national importance of a noncombatant nature. Each of the registrants knowingly and deliberately refused to obey the local draft board's orders of induction. Their indictment for a willful violation of Sec. 11 of the Selective Service Act followed.

At trial the government's proofs embraced the record facts with respect to each of the registrants, to which we have already made reference. In defense, each of the registrants offered to prove that he was an ordained minister of the Jehovah's Witnesses, this, for the avowed purpose of establishing error as the result of arbitrary and capricious conduct on the part of the local draft board in classifying the registrants, who urged that the draft board's

alleged error justified them in refusing to obey the board's order of induction and that therefore they were not guilty of willful violation of the Selective Service Act.

The learned trial judge excluded the particular matter proffered in defense, refused to charge the jury, as requested, that if the registrants should have been classified under IV-D rather than IV-E, their failure to comply with the draft board's order of induction was not a violation of the Act, and instructed the jury to disregard that portion of the summation by defendants' counsel wherein he argued to the same effect as his request for charge which had been refused. We think that the matter offered by the defendants, relating, as it did, to the draft board's exercise of its discretion in its administration of the Selective Service Act, was wholly irrelevant and immaterial to the charge contained in the indictment and that the action of the trial court was proper.

Section 10 (a) (2) of the Selective Training and Service Act of 1940 (50 U.S.C.A. (Appendix) §310 (a) (2)) provides in part here material that " * * * Such local [draft] boards * * * shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards * * *, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules or regulations as the President may prescribe."

The courts have uniformly ruled that the findings whereon draft boards base their decisions are final and may not be disturbed by the courts unless it appears that

the person affected thereby has not been afforded a full and fair hearing or unless the members of the local draft board acted contrary to law or abused the discretion reposed in them by the statute. *United States ex rel. Pascuito v. Baird*, 39 F. Supp. 411, 413 (E.D.N.Y.); *United States ex rel. Broker v. Baird*, 39 F. Supp. 392, 394 (E.D.N.Y.); *United States ex rel. Errichetti v. Baird*, 39 F. Supp. 388, 391-392 (E.D.N.Y.); *United States ex rel. Filomio v. Powell*, 38 F. Supp. 183, 189 (D.N.J.); *Dick v. Tevlin*, 37 F. Supp. 836, 838 (S.D.N.Y.). A similar rule has been evolved by court decision under the Selective Draft Law of 1917: *Arbitman v. Woodside*, 258 Fed. 441, 442 (C.C.A. 4); *United States ex rel. Pascher v. Kinlead*, 250 Fed. 692, 694 (C.C.A. 3); *Boitano v. District Board*, 250 Fed. 812, 813 (N.D.Cal.). No jurisdiction is conferred upon the courts by the Selective Service Act of 1940 to review the findings of local draft boards. *Shimela v. Local Board*, 40 F. Supp. 808, 810 (N.D. Ohio); *Petition of Soberman*, 37 F. Supp. 522, 523 (E.D.N.Y.). Here again the rule is similar to the construction placed upon the Selective Draft Law of 1917. See *Ex parte Hutfliis*, 245 Fed. 798, 799 (W.D.N.Y.). Nor is the merit of the decision by a local draft board subject to court review upon writ of certiorari (*Allison v. Local Board*, 43 F. Supp. 896 (N.D.Cal.)) or upon writ of habeas corpus (*United States ex rel. Troiani v. Heyburn*, 245 Fed. 360, 362 (E.D.Pa.)). However, a registrant who has been inducted pursuant to the Selective Service Act may, by writ of habeas corpus, obtain a judicial determination as to whether the local draft board acted in an arbitrary and capricious manner or denied the registrant a full and fair hearing. See *United States ex rel. Pascuito v. Baird*, *supra*; *United States ex rel. Errichetti v. Baird*, *supra*; *Application of*

Greenberg, 39 F. Supp. 13, 16 (D.N.J.); *United States ex rel. Filomio v. Powell*, supra, at p. 186; *Dick v. Tevlin*, supra.

Whether a registrant is a minister of religion presents a question of fact which, from its very nature, is committed by the Act to the determination of the competent local draft board. *Johnson v. United States*, 126 F.2d 242, 247 (C.C.A. 8). The only appeal from a finding of such nature is the appeal provided by the Act to the county appeal board. It is only in a limited number of instances which involve primarily questions of dependency that registrants may appeal to the President;² and the records in the instant cases do not present situations appropriate for appeal to the President. Persons obliged to register under the Selective Service Act are not entitled to exemption as a matter of right. The discretion to determine whether certain classes of registrants should be exempted or deferred is reposed by the Act in the President and the boards or agencies which he is further authorized to create for the purpose of administering the Act. In *United States ex rel. Koopowitz v. Finley*, 245 Fed. 871, 877 (S.D.N.Y.), which arose under the Selective Draft Law of 1917, the court said that "Whether a person is a nondeclarant alien or not is a question of fact, exactly the same as whether a person is a duly ordained

²Vol. 3 Selective Service Regulations §27 provides that appeal from a determination of a board of appeal may be made to the President, only if all the following conditions are satisfied: (1) the appeal board must have placed the registrant in Class I or Class IV-E, and at least one or more members of the board of appeal must have dissented from a determination that the registrant should not be deferred because of dependency; (2) the appeal to the President must be on ground of dependency alone; (3) appeal must be signed by registrant, dependent of registrant, or government appeal agent; (4) appeal must be made within five days of mailing of Notice of Classification or Notice of Continuance of Classification, unless local board grants extensions of time; and (5) a member of local board, the government appeal agent, or the Governor must explain and certify, in writing, that great and unusual hardship will follow the induction of the registrant, and the person so certifying must specifically recommend deferment.

minister of religion * * *, and the clear purpose of the act was that the fact should be ascertained by the administrative boards which the President was authorized to create. Any other method would have made the act, * * * unworkable * * *.

As the decision of the local draft board with respect to the proper classification of each of the present appellants was final and conclusive, alleged error of decision by the board in the exercise of its statutory discretion was not germane to the charge for which the appellants were indicted and was therefore not for the consideration of the jury. What the jury was required to determine was whether the registrants after classification, which had been confirmed on appeal, intentionally ignored the board's order to report for induction (an offense under Sec. 11 of the Act). Any matter exculpatory of the defendants would be such as indicated their lack of intent to disregard the board's order, e.g., if the board failed to send the registrants notice to appear, or if the registrants did not receive the notice through no fault or neglect of their own. The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary or capricious manner are not defenses to a prosecution under the Act for a failure to comply with the board's order. In *Johnson v. United States*, supra, it is intimated that perhaps a defendant in a prosecution under the Act for refusal to report for induction may raise an issue as to whether the local board acted in an arbitrary and capricious manner. The intimation, however, is merely a dictum. What was actually held was that no such question could be raised in that case since the defendant had not exhausted the administrative remedies open to him.

We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts. The court below therefore properly excluded the matter proffered in defense by the present appellants.

The judgment of the District Court in each case is affirmed.

A true Copy:

Teste:

*Clerk of the United States Circuit Court of Appeals
for the Third Circuit.*

FILE COPY

Office - Supreme Court, U. S.
FILED

AUG 16 1943

**ELMORE CROPLEY
CLERK**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

**Motion for Leave to Amend Petition
for Writ of Certiorari, or, in the
Alternative, to be Permitted to Argue
Certain Issues Before the Court**

**HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
*Attorneys for Petitioner***

INDEX

CASES CITED

| | PAGE |
|---------------------------|------|
| Kessler v. Stricker | |
| 307 U. S. 22, 34 | 3, 4 |
| Mahler v. Eby | |
| 264 U. S. 32, 45 | 3 |
| Rorock v. Devon Syndicate | |
| 307 U. S. 299, 303 | 3 |
| Sibbach v. Wilson & Co. | |
| 312 U. S. 1, 16 | 2, 3 |
| Smith v. United States | |
| 150 U. S. 50 | 3 |
| United States v. Grieme | |
| 128 F. 2d 811 | 2, 3 |
| Weems v. United States | |
| 217 U. S. 349, 362 | 3 |
| Wiborg v. United States | |
| 163 U. S. 632, 659 | 2-3 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

■
NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA
■

Motion for Leave to Amend Petition for Writ of Certiorari, or, in the Alternative, to be Permitted to Argue Certain Issues Before the Court

MAY IT PLEASE THE COURT:

Now comes the petitioner and moves the Court for leave to amend the petition for writ of certiorari so as to clarify the questions presented, or, in the alternative, for permission to brief and argue certain questions upon final hearing.

The underlying question presented in this case is: Can a defendant indicted and charged with violating the Selective Training and Service Act of 1940 for failure to report for induction as directed by a local board urge as a defense to the indictment that he was a minister of religion exempt from service, that the board had no jurisdiction and that the indictment based on the board's order is void?

This question was presented to the trial court by offers of proof, motion for dismissal at the close of the govern-

ment's case, objections to the charge of the court to the jury, and the requested issues. (R. 20, 30-31, 71-79, 6) The same question and the incidental questions based thereon were duly urged by assignments of error timely filed in the Circuit Court of Appeals. (R. 89-99) Rulings of the trial and appeal courts were based upon the proposition that the illegality of the local board's order is not available as a defense. *United States v. Grieme*, 128 F. 2d 811.

In the petition for writ of certiorari certain questions are presented. Questions 1, 2 and 9 raise the incidental question as to rulings on the evidence. Question number 7 raises the incidental question as to the court's charge. Question number 8 raises the incidental question as to the requested charges refused by the court. Questions numbers 4, 5, 6 and 10 present the general proposition of the action of the trial court in denying the defense. These last mentioned questions properly ought to permit consideration by this Court of the following additional questions:

(11) Does the undisputed evidence show petitioner is not guilty because petitioner is exempt by Act of Congress from duty or service thereunder?

(12) Did the trial court commit reversible error in overruling petitioner's motion to dismiss filed at the close of the government's case?

(13) Should this Court reverse, set aside the verdict, and dismiss the indictment or in the alternative order a new trial because the petitioner is not guilty?

These three questions ought properly to be allowed and considered by the Court because they are impliedly raised by questions numbers 4, 5 and 6 in the petition. Questions 11 and 13 should be permitted because in a criminal case if the record shows the accused is not guilty, or as a matter of law the government has failed to make a case against the defendant, this Court can *sua sponte* consider the question and reverse the judgment. This was done in *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16. See also *Wiborg v. United*

States, 163 U. S. 632, 659; *Weems v. United States*, 217 U. S. 349, 362; *Mahler v. Eby*, 264 U. S. 32, 45; and *Kessler v. Stricker*, 307 U. S. 22, 34.

These questions, together with question number 12, should be considered because they do not present a new issue or problem to the Court for consideration. Each question is incidental to the determination of the specific and general questions presented in the petition. *Rorock v. Devon Syndicate*, 307 U. S. 299, 303. The issue of the right to urge the defense to the indictment remains with the Court even if the questions are not allowed.

Question number 12 should be permitted. The motion for dismissal presented at the close of the government's case was not waived by the subsequent proceedings.

The evidence subsequently offered did not aid or strengthen the government's case. Exhibit C confirmed what was shown in the questionnaire introduced by the government, to wit, that petitioner was exempt as a minister. (Government's Exhibit 2) There was no evidence subsequently introduced which made a jury question. There is no need to apply the rule of waiver here by failure to renew the motion at the close of the evidence. After the government rested, almost the entire proceedings were offers of proof to complete bills of exception on evidence excluded by the court, which rulings were based on *United States v. Grieme*, supra. The rule of waiver of motion to dismiss for failure to renew at the close of the case should not apply because it is not necessary to permit the evidence to be reviewed. We do not urge the insufficiency of the evidence, but it is urged that there is *no evidence* to sustain the verdict because the undisputed and government's evidence shows that petitioner is a minister exempt from duty under the Act. In the circumstances a gross injustice would result if the Court does not review the evidence. *Smith v. United States*, 150 U. S. 50; *Wiborg v. United States*, supra; *Weems v. United States*, supra; *Sibbach v. Wilson & Co.*, supra; *Mahler v.*

Eby, supra; and *Kessler v. United States, supra*. See also Rule 37 of this Court.

Petitioner's requested charges to the jury, objections to the court's charge and the assignments based thereon present the same question as that which we ask to urge upon all the evidence before the Court under these questions. See Questions 7 and 8 of Petition. Permitting the amendment will facilitate the presentation of all the related and incidental questions.

A copy of this motion has been duly served upon the Solicitor General in the manner required by the rules of this Court.

WHEREFORE petitioner prays that the Court permit the petition to be amended so as to allow the three above questions to be added; or, in the alternative, upon final hearing petitioner be permitted to discuss in the brief and upon oral argument that, as a matter of law, he was exempt from duty of training and service under the Act, and accordingly the local board had no jurisdiction and that the indictment based thereon was void. Petitioner prays for such other and further relief to which he may show himself justly entitled upon a determination hereof.

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT

Attorneys for Petitioner

FILE COPY

Office - Supreme Court, U. S.

FILED

SEP 23 1943

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA



ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF

HAYDEN C. COVINGTON

VICTOR F. SCHMIDT

Attorneys for Petitioner

HAYDEN C. COVINGTON, of Counsel

INDEX

SUBJECT INDEX

| | PAGE |
|---|--------|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statute and Regulations Involved | 3 |
| History and Facts of the Case Showing Questions Presented | 3 |
| Specification of Errors to be Urged | 9 |
| Preliminary Statement | 10 |
| Summary of Argument | 14 |
| Points for Argument | 20 |
| ARGUMENT | 23-102 |

ONE—This Court should hold that petitioner, on trial for an alleged violation of the Selective Training and Service Act charged with disobedience of the local board's induction order, can urge as a defense to indictment the invalidity of the induction order, because the undisputed evidence showed he was a minister of religion exempt from induction for service of any kind under the Act and that all rulings of the court below based on the proposition that such defense is not available should be reversed 23

[A] Since the Magna Carta and the Bill of Rights, in the British and American courts history shows that the accused, upon the trial of any criminal charge, may urge without limitation any and all defenses that are available under the law and procedure. This fundamental right was denied petitioner by the lower courts 23

[B] The right of petitioner to present his defense to an indictment charging a violation of the Selective Training and Service Act should be as broad as the avenue of defense under plea of "not guilty", in other prosecutions within the jurisdiction of the federal courts 27

[C] Availability of the writ of habeas corpus as a remedy does not limit the defenses available in this sort of criminal case 39

SUBJECT INDEX

PAGE

[D] Decisions holding that petition for writ of habeas corpus is the only available remedy to determine the validity of a selective service local board's order to report for induction do not control here so as to deny a defense or narrow the scope of review under an indictment charging a violation of the Selective Training and Service Act 44

[E] The order of the local board directing the petitioner to report for induction is a final order so as to permit judicial review of the invalidity of the local board's order 49

[F] The rule announced and followed in the *Grime* case transfers and surrenders the judicial power of the federal courts so as to make the courts mere administrative sentencing agents of the local boards, denying the petitioner a judicial criminal trial 54

[G] The duty of the federal district court on trial of the indictment required it to hear evidence *de novo* and decide the case without regard to, and independent of, the administrative determination by the local board and to apply the fundamental rules of criminal procedure in determining whether the petitioner violated the Selective Training and Service Act 58

[H] It is the duty of the trial court to make a *de novo* inquiry and an independent determination as to the jurisdiction of the local board and petitioner's claim for exemption from induction process under the Act and Regulations 60

[I] The judicial review of rulings on exempt classifications and determinations discretionary by the local board, within the power of the Selective Service System, is as broad as the scope of judicial review permitted as to determinations by other administrative boards 64

SUBJECT INDEX

PAGE

| | |
|---|----|
| TWO—This Court should hold that the indictment should have been dismissed upon the petitioner's motion for dismissal at close of the government's case or <i>sua sponte</i> at the close of the evidence because the undisputed evidence showed that petitioner was a minister of religion completely exempt from induction for service of any kind under the Act and the board had no jurisdiction; therefore the order of the local board is void and the government wholly failed to prove a violation of the Selective Training and Service Act | 66 |
| [A] Modern history of the exemption of ministers of religion under the conscription acts. | 66 |
| [B] Jehovah's witnesses are recognized as a religious organization under the Selective Training and Service Act and each one whose full time is devoted to preaching the gospel, under the direction of the governing body of the organization, is exempt from all training and service under the Act because a duly ordained minister of religion | 70 |
| [C] The uncontradicted evidence shows that petitioner is a duly ordained minister of religion regularly performing duties as such within the purview of Section 5 (d) of the Selective Training and Service Act and Section 622.44 of the Selective Service Regulations | 85 |
| [D] Claiming to be a "conscientious objector" did not militate against the claim of petitioner for complete exemption as an <i>ordained minister</i> | 93 |
| [E] The action of the local board and the appeal board in denying petitioner's claim for exemption was not supported by the evidence, was contrary to the evidence, arbitrary and capricious | 94 |
| [F] The judgments of the courts below should be reversed and the indictment ordered dismissed because the government's evidence has been fully developed and no good purpose would be served by ordering a new trial, if this Court reaches the conclusion that the trial court erred in denying the motion for a directed verdict | 96 |

SUBJECT INDEX

PAGE

THREE—This Court should hold that the trial court erred in charging the jury that petitioner could not challenge the validity of the induction order because the determination by the local board was binding upon the court and jury 97

FOUR—This Court should hold that upon the trial of the indictment petitioner was entitled to have the trial court give requested charges submitting his defense that if the jury found petitioner was a minister of religion and that the local board had notice thereof from his Selective Service questionnaire, or if the jury found that the board had such notice, the jury should return a verdict of "not guilty" 97

FIVE—This Court should hold that upon the trial of the indictment petitioner was entitled to have the trial court give requested charges submitting his defense that if the board was prejudicial, unfair, arbitrary and capricious in making his classification, the jury should return a verdict of "not guilty" 98

SIX—This Court should hold that upon the trial of the indictment, petitioner was entitled to have the jury consider oral testimony and documentary evidence offered by petitioner to show that he was regularly practicing as a minister of religion and that the local board had notice of such status before classification 99

SEVEN—This Court should hold that upon the trial of the indictment, petitioner was entitled to have the jury consider oral testimony offered by petitioner to show that the local board denied him a hearing on personal appearance and that the members were prejudiced against petitioner 101

Conclusion 104

CASES CITED

PAGE

| | |
|--|--------|
| Alexander v. United States | 50 |
| 201 U. S. 117 | |
| American School of Magnetic Healing v. McAnnulty | 48 |
| 187 U. S. 94 | |
| Angelus v. Sullivan | 65 |
| 246 F. 54 | |
| Arbitman v. Woodside | 65 |
| 258 F. 441 | |
| Baldwin v. McClinch | 74 |
| 1 Me. (1 Greene) 102, 107 | |
| Baltimore Carolina Line v. Redman | 96 |
| 295 U. S. 654 | |
| Bank of Columbia v. Okely | 30 |
| 4 Wheat. 235 | |
| Bata Shoe Co. v. Perkins | 37 |
| 33 F. Supp. 509 | |
| Baxley v. United States | 38 |
| 134 F. 2d 998 | |
| Beales, Ex parte | 65 |
| 252 F. 177 | |
| Benesch v. United States | 65 |
| 132 F. 2d 430 | |
| Bentley's Case, Doctor (Rex v. Cambridge Univ.) | 24 |
| 1 Strange 557, 567 | |
| Bird v. United States | 97 |
| 180 U. S. 356 | |
| Board of Health v. Heister | 35 |
| 37 N. Y. 661 | |
| Bollman, Re | 100 |
| 4 Cranch 75 | |
| Borchert v. Ranger | 72 |
| 42 F. Supp. 577 | |
| Bowen v. Johnston | 40 |
| 306 U. S. 19 | |
| Bowles v. United States | 38, 65 |
| 1313 F. 2d 818 | |
| Bradstreet v. Neptune Ins. Co. | 26 |
| 3 Sumn. (U. S.) 600 | |

CASES CITED

PAGE

| | |
|---|----------------|
| Brady v. United States | |
| 24 F. 2d 404 | 88 |
| Brewster v. Gage | |
| 280 U. S. 327, 336 | 70 |
| Bruno v. United States | |
| 308 U. S. 287 | 97 |
| Burrus, In re | |
| 136 U. S. 586 | 31 |
| Burton v. United States | |
| 196 U. S. 283 | 97 |
| Butticeali v. United States | |
| 130 F. 2d 172 | 65, 89 |
| Cain, Ex parte | |
| 39 Ala. 440, 441 | 72, 75, 89, 92 |
| California v. Latimer | |
| 305 U. S. 255 | 34 |
| Cantwell v. Connecticut | |
| 310 U. S. 296 | 71 |
| Chester v. Bateson | |
| 1 Kings Bench 829 | 58 |
| Chicago & N. W. R. v. Ohle | |
| 117 U. S. 123 | 106 |
| Chiciuski v. United States | |
| 129 F. 2d 461 | 65 |
| Chin Yow v. United States | |
| 208 U. S. 8 | 63 |
| Cobbledick v. United States | |
| 309 U. S. 323, 327-328 | 31, 51 |
| Cohen, Ex parte | |
| 254 F. 711 | 65 |
| Cohens v. Virginia | |
| 6 Wheat. 264, 404 | 54 |
| Cole v. Vincent | |
| 285 U. S. 22, 62 | 36 |
| Commonwealth v. Y. M. C. A. | |
| 116 Ky. 711, 76 S. W. 522 | 73 |
| Consolidated Edison Co. v. N. L. R. B. | |
| 305 U. S. 197 | 49, 95 |
| Continental Casualty Co. v. United States | |
| 314 U. S. 527, 533 | 15 |

CASES CITED

| | PAGE. |
|---|------------|
| Cooley v. O'Conner 12 Wall. 391 | 102 |
| Crane v. State 5 Okla. Cr. 560 | 35 |
| Crawford v. United States 212 U. S. 183 | 102 |
| Crowell v. Benson 285 U. S. 22 | 63 |
| Dartmouth College v. Woodward 4 Wheat. 519 | 25, 58 |
| Davis v. Dep't of Labor and Industries No. 86, Oct. Term 1942, 63 S. Ct. 225 | 63 |
| Davis v. United States 160 U. S. 469 | 35, 59, 88 |
| Diaz v. United States 223 U. S. 442 | 33 |
| Dowdell v. United States 221 U. S. 325, 330 | 33 |
| Edwards v. United States 312 U. S. 473, 482 | 33, 88 |
| Edwards v. United States 7 F. 2d 357 | 59, 88 |
| Ellis v. Interstate Commerce Comm'n 237 U. S. 434 | 50 |
| Endicott Johnson Corp. v. Perkins 63 S. Ct. 339 | 50 |
| Fawcett Machine Co. v. United States 282 U. S. 375 | 70 |
| Federal Power Comm'n v. Metropolitan Edison Co. 304 U. S. 375 | 50 |
| Fire Department of City of New York v. Gilmour 149 N. Y. 453 | 35 |
| Fletcher v. United States 129 F. 2d 262 | 38, 65, 89 |
| Franke v. Murray 248 F. 865 | 46, 65 |
| Goff v. United States 135 F. 2d 610 | 38, 65, 95 |
| Greenberg, Application of 39 F. Supp. 13 | 65 |

CASES CITED

| | PAGE |
|--|------------|
| Haberman v. United States | |
| 131 F. 2d 1018 | 38 |
| Hagar v. Reclamation Dist. No. 108 | |
| 111 U. S. 701 | 33 |
| Haggin v. Haggin | |
| 35 Neb. 375, 53 N. W. 209-221 | 74 |
| Harriman v. Interstate Commerce Comm'n | |
| 211 U. S. 407 | 50 |
| Harrison v. Vose | |
| 9 How. 372, 378 | 49 |
| Hawkes v. Moxey | |
| 86 L. J. K. B. 1530 | 32, 72, 92 |
| Helvering v. Hammel | |
| 311 U. S. 504, 510 | 30, 49 |
| Holiday v. Johnston | |
| 313 U. S. 342 | 40 |
| Honaker v. United States | |
| 135 F. 2d 613 | 38, 65 |
| Howat v. Kansas | |
| 258 U. S. 181, 189-190 | 31 |
| Hurtado v. California | |
| 110 U. S. 516, 529 | 26 |
| Hutflis, Ex parte | |
| 245 F. 798 | 65 |
| Interstate Commerce Comm'n v. Brimson | |
| 154 U. S. 447 | 50 |
| Jamison v. Texas | |
| 318 U. S. 413 | 71 |
| Johnson v. United States | |
| 126 F. 2d 242, 247 | 38, 95 |
| Johnson v. Zerbst | |
| 304 U. S. 458 | 40 |
| Jones v. Opelika | |
| 319 U. S. —, 63 S. Ct. 890 | 71 |
| Kessler v. Stricker | |
| 307 U. S. 22, 34 | 67 |
| Kidder v. French | |
| N. H., Smith, 155, 156 | 74 |
| Kipps v. Lane | |
| 86 L. J. K. B. 735 | 72, 92 |

CASES CITED

PAGE

| | |
|--|---------|
| Kirby v. United States | |
| 174 U. S. 47 | 32 |
| Konda v. United States | |
| 166 F. 91 | 59, 97 |
| Largent v. Texas | |
| 318 U. S. 418 | 71 |
| Locke v. United States | |
| 75 F. 2d 157, 159 | 31 |
| Lovell v. Griffin | |
| 303 U. S. 444 | 71 |
| Mabler v. Eby | |
| 264 U. S. 32, 45 | 67 |
| Mangum v. United States | |
| (CCA-5) No. 10384 October Term 1942 | 38 |
| Martin v. Struthers | |
| 319 U. S. —, 63 S. Ct. 862 | 71 |
| McCann v. New York Stock Exchange | |
| 80 F. 2d 211, 214; certiorari denied 299 U. S. 643 | 31 |
| McClintock v. United States | |
| 60 F. 2d 839, 842 | 88 |
| McDonald, Ex parte | |
| 253 F. 99 | 65 |
| McGinnis v. California | |
| 247 U. S. 95 | 102 |
| McLean v. Jephson | |
| 123 N. Y. 142 | 35 |
| McLeod v. Majors | |
| 120 F. 2d 128, 129 | 31 |
| M. E. Church v. Hinton | |
| 92 Tenn. 183, 190, 21 S. W. 321, 322 | 73 |
| Micheli v. Paullin | |
| 45 F. Supp. 687 | 65 |
| Milligan, Ex parte | |
| 4 Wall. 2, 123 | 54 |
| Mitchell v. United States | |
| 313 U. S. 80 | 66 |
| Morgan v. United States | |
| 298 U. S. 468; 304 U. S. 1; 304 U. S. 23; | |
| 307 U. S. 183; 313 U. S. 409 | 66, 102 |

CASES CITED

PAGE

| | |
|---|----------------|
| Murdock v. Pennsylvania | |
| 319 U. S. —, 63 S. Ct. 870 | 71, 72, 73, 89 |
| Muskrat v. United States | |
| 219 U. S. 346 | 54 |
| N. L. R. B. v. Columbian Enameling & Stamping Co. | |
| 306 U. S. 292 | 95 |
| Ng Fung Ho. v. White | |
| 259 U. S. 276 | 48 |
| Offord v. Hiscock | |
| 86 L. J. K. B. 941 | 32, 72, 92 |
| Ozawa v. United States | |
| 260 U. S. 178, 194 | 30, 49 |
| Pennington v. Cox | |
| 2 Cranch 33, 52 | 49 |
| People v. Barber | |
| 42 Hun (N. Y.) 27 | 73 |
| People v. Kaye | |
| 212 N. Y. 407, 416 | 35 |
| People v. McCoy | |
| 125 Ill. 289, 17 N. E. 786 | 36 |
| Perkins v. Lukens Steel Co. | |
| 310 U. S. 113 | 63 |
| Pierce v. United States | |
| 314 U. S. 306 | 97 |
| Platt, Ex parte | |
| 253 F. 413 | 65 |
| Quercia v. United States | |
| 287 U. S. 466 | 97 |
| Railroad Comm'n v. Rowan & Nichols Oil Co. | |
| 310 U. S. 573 | 66 |
| Rase v. United States | |
| 129 F. 2d 204 | 65; 89 |
| Reinhart, In re | |
| 9 Ohio S. & C. P. Dec. 441, 445 | 76, 89 |
| Rex v. Cambridge University | |
| 1 Strange 557, 567 | 24 |
| Richter v. State | |
| 16 Wyo. 437 | 35 |
| Robert, Ex parte | |
| 49 F. Supp. 131 | 65 |

CASES CITED

| | PAGE |
|--|------------|
| Rochester Telephone Corp'n v. United States | |
| 307 U. S. 125 | 54, 66 |
| Rogers, In re | |
| 47 F. Supp. 265 | 65 |
| St. Joseph Stock Yards Co. v. United States | |
| 298 U. S. 38, 49-54 | 63, 66 |
| Schneider v. State of New Jersey | |
| 308 U. S. 147 | 71 |
| Scripps-Howard Radio, Inc. v. | |
| Federal Communications Commission | |
| 316 U. S. 4 | 66 |
| Securities Exchange Comm'n v. Tung Corp'n of America | |
| 32 F. Supp. 371 | 64 |
| Seele v. United States | |
| 133 F. 2d 1015 | 38, 65 |
| Shields v. Utah-Idaho Cent. Ry. | |
| 305 U. S. 177, 183 | 64, 66 |
| Sibbach v. Wilson & Co. | |
| 312 U. S. 1, 16 | 31, 67 |
| Silver Co. v. Federal Trade Comm'n | |
| 292 F. 752, 753 | 64 |
| Slidell v. Grandjean | |
| 111 U. S. 412, 421 | 15 |
| Smith v. O'Grady | |
| 312 U. S. 329 | 40 |
| Smith v. United States | |
| 208 F. 131 | 59, 88, 96 |
| Sorrells v. United States | |
| 287 U. S. 430, 446 | 15, 30 |
| Spencer v. People | |
| 68 Ill. 510 | 35 |
| Starr v. United States | |
| 153 U. S. 614 | 97 |
| State v. Kirby | |
| 120 Iowa 26 | 35 |
| State v. Lamos | |
| 26 Me. 258 | 35 |
| State v. Rachskowski | |
| 86 Conn. 677 | 37 |

CASES CITED

PAGE

| | |
|---|---|
| State v. Weimer | |
| 64 Iowa 243 | 35 |
| Stevens v. Casey | |
| 228 Mass. 368, 117 N. E. 588 | 36 |
| Stewart, Ex parte | |
| 47 F. Supp. 410 | 40, 65 |
| Stone vs United States | |
| 113 F. 2d 70 | 37 |
| Thieret, Ex parte | |
| 268 F. 472 | 65 |
| Town of Londonderry v. Town of Chester | |
| 2 N. H. 268 | 74 |
| Trustees of First M. E. Church South v. City of Atlanta | |
| 76 Ga. 181, 192 | 73 |
| United States v. American Trucking Ass'ns, Inc. | |
| 310 U. S. 534, 542 | 15, 30, 49 |
| United States v. Arredondo | |
| 6 Pet. 691, 714 | 15, 30 |
| United States v. Commanding Officer | |
| 252 F. 314 | 65 |
| United States v. Delaware & Hudson Co. | |
| 213 U. S. 366, 407 | 30 |
| United States v. Dickson | |
| 15 Pet. 141, 162 | 54 |
| United States v. Di Lorenzo | |
| 45 F. Supp. 590 | 38, 65 |
| United States v. Embrey | |
| 46 F. Supp. 916 | 65 |
| United States v. Grieme | |
| 128 F. 2d 811 | 1, 8, 23, 25, 26, 28, 29, 38, 41, 48, 55, 56, 57, 58, 62, 65 |
| United States v. Heyburn | |
| 245 F. 360 | 65 |
| United States v. Illinois Central R. Co. | |
| 244 U. S. 82 | 50 |
| United States v. Kauten | |
| 133 F. 2d 703 | 38, 50, 65 |
| United States v. Kinkead | |
| 248 F. 141; aff'd 250 F. 692 | 65 |

CASES CITED

PAGE

| | |
|--|------------|
| United States v. Kirby | |
| 7 Wall. 482, 486-487 | 15, 30, 49 |
| United States v. Maher | |
| 307 U. S. 148 | 66 |
| United States v. McIntyre | |
| 4 F. 2d 823 | 46 |
| United States v. Mroz | |
| — F. 2d — | 38, 65 |
| United States v. Murdock | |
| 284 U. S. 141 | 34 |
| United States v. Murdock | |
| 290 U. S. 389, 394-396 | 34, 98 |
| United States v. Murphy | |
| 253 F. 404, 407 | 88 |
| United States v. Rauch | |
| 253 F. 814 | 65 |
| United States v. St. Paul M. & M. R. Co. | |
| 247 U. S. 310, 313 | 30 |
| United States v. Shackford | |
| 5 Mason 445, 450 | 49 |
| United States v. Smith | |
| 48 F. Supp. 842 | 65 |
| United States ex rel. Broker v. Baird | |
| 30 F. Supp. 392 | 65 |
| United States ex rel. Errichetti v. Baird | |
| 39 F. Supp. 388 | 65 |
| United States ex rel. Feld v. Bullard | |
| 290 F. 704; certiorari denied 262 U. S. 760 | 46 |
| United States ex rel. Filomio v. Powell | |
| 38 F. Supp. 183 | 65 |
| United States ex rel. Riverside Oil Co. v. Hitchcock | |
| 190 U. S. 316 | 49 |
| United States ex rel. Ursitti v. Baird | |
| 39 F. Supp. 411 | 65 |
| United States ex rel. Ursitti v. Baird | |
| 39 F. Supp. 872 | 65 |
| Utah Fuel Co. v. Bituminous Coal Comm'n | |
| 306 U. S. 56 | 54, 64 |
| Ver Mehren v. Sirmeyer | |
| 36 F. 2d 876, 882 | 41, 43 |

CASES CITED

| | PAGE |
|--|--------|
| Waley v. Johnston | |
| 316 U. S. 101 | 40 |
| Walker v. Johnston | |
| 312 U. S. 275 | 40 |
| Wayne v. Thompson | |
| L. R. 15 Q. B. 342 | 36 |
| Weems v. United States | |
| 217 U. S. 349, 362 | 67 |
| Wilborg v. United States | |
| 163 U. S. 632 | 67 |
| Wilson v. United States | |
| 263 U. S. 563, 570 | 35 |
| Windsor v. McVeigh | |
| 93 U. S. 274, 277, 278 | 26 |
| Wise v. Withers | |
| 3 Cranch 329 | 18, 60 |
| Wong Wing v. United States | |
| 163 U. S. 228, 238 | 55 |
| Wright v. Vinton Branch of M. Trust Bk. of Roanoke | |
| 300 U. S. 440 | 30 |
| Zuziak v. United States | |
| 119 F. 2d 140 | 88 |

STATUTES CITED

| | |
|---|--------------------|
| British Military Service Act, 1916 | 32 |
| British National Service [Armed Forces] Act | |
| 1939, (2 and 3 Geo. ch. 81) | 32 |
| Burke-Wadsworth Bill (H. R. 10132) | 67 |
| Conscription Act of 1812 | 11, 45 |
| Conscription Act of March 3, 1863 | |
| (12 Stat. 731) | 11, 45 |
| Conscription Act of 1917 | |
| (40 Stat. 76) | 11, 16, 45, 46, 47 |
| Militia Act of May 8, 1792 | 11, 60 |
| New Hampshire Constitution, Article 6 | 74 |
| Ohio Revised Statutes, Section 6386 | 75 |

STATUTES CITED

PAGE

| | |
|--|------------------------------|
| Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Appendix, ss. 301-318) | 2, 3, 10, 12, 14, 16, 44, 45 |
|--|------------------------------|

[Note: For text of pertinent parts of the Act see
Appendix to this brief, printed separately.]

| | |
|--|-----------------------------------|
| Section 2 | 10 |
| Section 3 (a) | 10 |
| Section 5 (d) | 3, 11, 19, 61, 68, 70, 71, 85, 92 |
| Section 5 (g) | 11 |
| Section 10 | 11, 48 |
| Section 11 | 29 |
| United States Code | |
| Title 10, Section 1473 [Articles of War] | 41 |
| Title 28, Section 41 (2) [Judicial Code] | 1, 27 |
| Title 50, Section 311 [Selective Tr. & Ser. Act, 1940] | 14 |
| United States Constitution, Amendment VI | 42 |

CONGRESSIONAL MATERIAL

| | |
|---|----------------|
| Congressional Record, Volume 86 | |
| Page 10709 | 46 |
| Page 10985 | 46 |
| <i>Hearings before the Committee on Military Affairs,</i> House of Representatives, 76th Congress, 3rd Session on H. R. 10132 | |
| | 43, 67, 68, 69 |

SELECTIVE SERVICE MATERIAL

| | |
|--|---------------------------------------|
| First Report of Director of Selective Service, 1940-41 | |
| <i>Selective Service in Peacetime</i> (1942) | 43, 47, 68 |
| Second Report of Director of Selective Service, <i>Selective Service in Wartime</i> (1943) | |
| | 38, 45, 47, 68, 77, 78, 85, 89, 91 |
| Selective Service Regulations | |

[Note: For text of pertinent parts of the Reg-
ulations see Appendix to this brief, printed
separately.]

| | |
|-----------------------|----|
| Section 601.5 | 30 |
| Section 601.7-8 | 45 |
| Section 603.1 | 11 |

STATUTES CITED

| | PAGE |
|------------------------------|---------------|
| Section 603.11 | 11 |
| Section 603.12 | 11 |
| Section 603.21 | 11 |
| Section 603.22 | 11 |
| Section 603.24 | 11, 53 |
| Section 603.52 | 11 |
| Section 603.54 | 11 |
| Section 622.12 | 11 |
| Section 622.44 | 3, 11, 70, 92 |
| Section 622.51 | 11 |
| Section 622.62 | 7 |
| Section 623.1 (c) | 8, 102 |
| Section 623.2 | 100 |
| Section 623.21 | 94, 100 |
| Section 625.1 | 8, 102 |
| Section 625.2 | 8, 102 |
| Section 627.25 | 53, 94 |
| Section 627.26 | 7, 12, 53, 94 |
| Section 628.1 | 11 |
| Section 628.2 | 11, 53 |
| Section 628.2-7 (a) | 53 |
| Section 633.1-9 | 45 |
| Section 642.1-5 | 46 |
| Section 652.1 | 11 |
| Section 652.2 | 11, 55 |
| Section 691.17 (d) (e) | 43 |

Director's Notes to Part 622.44

| | |
|---|-------------------------------|
| (National Headquarters Opinion No. 14) | 4, 5, 69, 70, 87, 92, 93, 100 |
|---|-------------------------------|

MISCELLANEOUS CITATIONS

PAGE

ALMIGHTY GOD, Word of [The Bible]:

| | |
|---|-----------|
| Genesis 3: 9, 11, 13 | 24 |
| Genesis, chapters 6 to 8 | 82 |
| Genesis 18: 19 | 86 |
| Exodus 2: 11, 12; 22: 2 | 28 |
| Numbers 1: 1-3, 45, 46; 2: 32-34; 26: 1, 2 | 12 |
| Numbers 1: 47-54; 2: 33 | 12 |
| Numbers 26: 62 | 12 |
| Deuteronomy 1: 16, 17; 17: 8 | 24 |
| Deuteronomy 6: 4-7 | 79-86 |
| Joshua 6: 1, 17-21; 8: 10-26 | 13 |
| Joshua 7: 19-21 | 24 |
| Judges 3: 8-30; chapters 4 and 12; 7: 19-22 | 13 |
| 1 Samuel 1: 24; 2: 41, 28 | 86 |
| 2 Chronicles, chapter 20 | 13 |
| Nehemiah 4: 13, 14 | 28 |
| Esther 8: 7-14 | 24 |
| Psalms 8: 2 | 86 |
| Psalms 45: 16 | 82 |
| Psalms 67: 6, 7; 72: 1, 4, 7, 8 | 82 |
| Psalms 71: 17 | 86 |
| Psalms 72: 1, 4, 7, 8 | 82 |
| Psalms 148: 12, 13 | 86 |
| Proverbs 8: 32 | 86 |
| Ecclesiastes 12: 1 | 86 |
| Isaiah 9: 6, 7 | 82 |
| Isaiah 32: 1 | 82 |
| Isaiah 11: 5-9; 25: 6-8; 65: 20-23 | 82 |
| Isaiah 61: 1, 3 | 5, 79, 84 |
| Jeremiah 26: 20-23 | 83 |
| Ezekiel 3: 17-19 | 83 |
| Ezekiel 9: 4 | 84 |
| Ezekiel 33: 6 | 82 |
| Ezekiel 33: 7-9 | 83 |
| Daniel 3: 10-25 | 24 |
| Micah 4: 3, 4 | 82 |
| Micah 5: 1-5 | 82 |
| Malachi 3: 3 | 83 |
| Matthew 3: 13-17 | 79 |
| Matthew 7: 15-20 | 83 |

MISCELLANEOUS CITATIONS

| | PAGE |
|--|--------|
| Matthew 8: 11 | 82 |
| Matthew 9: 35 | 81 |
| Matthew 10: 7, 10-14 | 81 |
| Matthew 18: 1-6 | 86 |
| Matthew 23: 13-17, 23-33 | 80 |
| Matthew 24: 14 | 79 |
| Matthew 27: 24 | 56 |
| Mark 6: 2 | 79 |
| Mark 6: 6 | 81 |
| Luke 2: 39-52 | 79 |
| Luke 2: 46-49 | 79, 86 |
| Luke 4: 17-19 | 5, 80 |
| Luke 4: 22 | 79 |
| Luke 8: 1 | 81 |
| Luke 11: 39-53 | 80 |
| Luke 17: 26, 27 | 82 |
| Luke 18: 16 | 86 |
| Luke 22: 24-27 | 81 |
| John 1: 29-34 | 79 |
| John 2: 15, 16 | 28 |
| John 4: 23, 24 | 81 |
| John 7: 51 | 24 |
| John 8: 25-32 | 79 |
| John 14: 21, 23 | 83 |
| John 15: 17-19 | 6 |
| John 17: 1, 6, 12, 24 | 80 |
| John 17: 16, 17 | 6 |
| John 18: 29-38 | 24 |
| John 18: 37 | 79 |
| Acts 4: 13 | 80 |
| Acts 10: 37, 38 | 79 |
| Acts 15: 36 | 84 |
| Acts 16: 1-3 | 86 |
| Acts 26: 20 | 81 |
| Acts 24: 1-26 | 24 |
| Romans 1: 31, 32 | 83 |
| 1 Corinthians 1: 26-29 | 80 |
| 1 Corinthians 4: 17 (<i>American Revised Ver.</i>) | 86 |
| 2 Corinthians 10: 3, 4 | 5 |
| Ephesians 6: 1-4 | 79, 86 |

MISCELLANEOUS CITATIONS

PAGE

| | |
|--|--------|
| Philippians 3:7-14 | 83 |
| 1 Timothy 4:12 | 86 |
| 2 Timothy 2:3 | 5, 86 |
| Hebrews 10:5-10 | 79 |
| Hebrews 10:38 | 83 |
| Hebrews 11:7 | 82 |
| Hebrews 13:15 | 83 |
| James 1:27 | 6, 81 |
| James 2:5 | 80 |
| 1 Peter 2:9 | 5 |
| 1 Peter 2:21 | 81 |
| 2 Peter 2:20-22 | 83 |
| 2 Peter 2:4, 5 | 82 |
| 1 John 2:15 | 6 |
| 1 John 2:27 | 80 |
| 1 John 5:19 (<i>Diaglott</i>) | 5 |
| Revelation 3:14 | 83 |
| Revelation 11:15 | 82 |
| Revelation 21:1-4 | 82 |
| American Bar Association Journal, Volume 28, page 164 | 38 |
| Appleton, E. R., <i>An Outline of Religion</i> , p. 356 | 13 |
| Articles of War, Article 64 | 41, 46 |
| Bell, U. S. Dist. Judge, March 1942 Am. Bar Ass'n Journal | 38 |
| Betten, Francis S., S. J., <i>The Ancient World</i> , p. 541 | 13 |
| Burke, Edmund, <i>Report on Hastings Trial of 1791</i> | 100 |
| California Law Review, Volume 28, pages 129 and 165 | 38 |
| California Law Review, Volume 30, page 226 | 38 |
| Capes, <i>Roman History</i> , page 113 | 13 |
| Capes, <i>The Roman Empire of the Second Century</i> , p. 135 | 13 |
| Cooley, <i>Constitutional Limitations</i> , page 736, 8th ed. | 25 |
| Courts-Martial, <i>A Manual for, U. S. Army</i> , page 218 | 41 |
| <i>Cyclopedia of Biblical, Theological and Ecclesiastical Literature</i> (McClintock and Strong), Vol. VII, pp. 411, 417 | 76, 77 |
| <i>Encyclopedia Americana</i> , 1942 Edition | |
| Volume 2, page 70 | 77 |
| Volume 20, page 752 | 26 |
| Volume 20, page 770 | 76 |

MISCELLANEOUS CITATIONS

| | PAGE |
|---|------|
| <i>Encyclopedia Britannica</i> , 11th edition, Vol. 28, page 527 | 76 |
| <i>Encyclopedia, The Catholic</i> | |
| 1907 Ed., Vol. 9, page 93 | 69 |
| 1911 Ed., Vol. 11, page 279 | 77 |
| 1911 Ed., Vol. 10, page 237 | 78 |
| Ferrero & Barbagallo, <i>A Short History of Rome</i> , p. 380 | 73 |
| George Washington Law Review, Vol. 10, page 827 | 38 |
| Georgia Law Journal, Volume 30, page 636 | 38 |
| Hayes and Moon, <i>Ancient and Medieval History</i> , p. 432 | 13 |
| Illinois Law Review, Vol. 36, pages 310, 352 | 38 |
| Indiana Law Journal, Vol. 17, pages 273, 281-282 | 94 |
| Lewis, <i>Appeal Procedure Under the Selective Service Law</i> (1942), 17 Ind. L. J. 273, 281-282 | 94 |
| McAllister, <i>Statutory Roads to Review of Federal</i> <i>Administrative Orders</i> 28 Calif. L. Rev., 129, 165 | 38 |
| McGehee, <i>Due Process of Law</i> , pages 5, 73 | 24 |
| Michigan Law Review, Volume 40, page 451 | 38 |
| Ohio State University Law Journal, Vol. 8, page 89 | 38 |
| Reither, <i>World History at a Glance</i> , page 102 | 13 |
| Sanford, <i>A Concise Cyclopaedia of Religious Knowledge</i> | 78 |
| Sheldon, <i>History of the Christian Church</i> , page 179 | 13 |
| Simpson, <i>Cyclopedia of Methodism</i> | 78 |
| Southern California Law Review, Nov. 1942, page 24 | 38 |
| Texas Law Review, Volume 20, page 371 | 38 |
| University of Pittsburgh Law Review, Vol. 8, p. 58 | 38 |
| Virginia Law Review, Volume 28, pages 626, 628 | 38 |
| Watchtower Bible and Tract Society, Inc., publications of, | |
| <i>Consolation</i> No. 551, October 30, 1940 | 13 |
| <i>Neutrality</i> (booklet) | 13 |
| <i>1942 Yearbook of Jehovah's witnesses</i> , pp. 40-48 | 84 |
| <i>Salvation</i> , page 279 | 12 |
| Webster, <i>New International Dictionary</i> | 76 |
| Webster, <i>Works of</i> , Volume 5, page 487 | 25 |
| West, Willis Mason, <i>The Ancient World</i> , pp. 522-523, 528 | 13 |
| West, Willis Mason and Ruth West, <i>The New World's</i> <i>Foundations in the Old</i> , page 131 | 13 |
| World Almanac, 1943 Edition, page 229 | 72 |
| Zollman, <i>American Church Law</i> , pp. 325, 329 | 73 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA



ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The opinion of the United States Circuit Court of Appeals (R. 99-100) reads as follows: "The judgment is affirmed upon the authority of *United States v. Grieme*, 128 F. 2d 811." That brief per curiam opinion is reported in 135 F. 2d 464.

Jurisdiction

The judgment of the United States Circuit Court of Appeals was entered May 16, 1943. (R. 100-101). The petition for writ of certiorari was filed May 28, 1943. Section 240 (a) of the Judicial Code, amended by Act of February 13, 1925, supports jurisdiction of this Court.

Questions Presented

The *fundamental* question to be determined is whether one, charged with a violation of the Selective Training and Service Act of 1940, refusing to report for induction as directed by the local selective service board may urge, as a defense to the indictment, that he is exempted by the Act from all service and not subject to induction process, because an "ordained minister of religion".

Incidental questions involved are:

Should the trial court have dismissed the indictment because the government failed to show guilt on the part of the petitioner, and because the undisputed evidence shows that the board's order to report for induction was void for want of jurisdiction since petitioner was a "minister of religion" exempted from all service?

Was it error for the trial court to instruct the jury it could not consider whether the board acted contrary to law in denying petitioner's claim for exemption?

Should the trial court have instructed the jury that if petitioner was exempted, or if the local board classified him arbitrarily and capriciously, a verdict of "not guilty" should be returned?

Should the trial court have admitted evidence to show that petitioner was a "minister of religion" customarily performing duties as such, that the local board was prejudiced and denied petitioner a hearing?

Statute and Regulations Involved

That part of the Selective Training and Service Act of 1940 involved here is set forth in the Appendix, printed separately, pages 1a to 11a. The pertinent Selective Service Regulations also appear in the Appendix, pages 11a to 36a.

History and Facts of the Case Showing Questions Presented

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania. The indictment contains one count charging that petitioner willfully failed and neglected to report for induction to do work of national importance as ordered to do after having been placed in Class IV-E, conscientious objector classification, by Local Board No. 11, West Newton, Pennsylvania. The indictment was filed November 12, 1942. (R. 82-83) Petitioner waived arraignment and pleaded "not guilty". (R. 83) The plea in abatement alleging that the indictment should be dismissed because based upon a void order of the local board was overruled. (R. 3-4, 8-9) Petitioner was tried to a jury. R. 8.

The clerk of the local board testified that petitioner duly registered (R. 10); duly filed his Selective Service questionnaire August 23, 1941. (R. 11) Petitioner's questionnaire showed that his present occupation was "Minister preaching the Gospel of God's Kingdom", as a "Pioneer for Watchtower Bible and Tract Society" (R. 52); that he was a minister of religion customarily serving as a minister since 1930; that he had been formally ordained on August 1, 1930, by the Watchtower Bible and Tract Society at Belle Vernon, Pa." R. 17, 18, 56.

Petitioner requested that he be classified as a minister of religion, Class IV-D.¹ (R. 57) Petitioner declared his

¹ Regulations, section 622.44; Selective Training and Service Act, 1940, S. 5 (d). Appendix pp. 17a, 35a.

conscientious objection to war. R. 56.

On or about August 30, 1941, petitioner duly filed the Special Form for Conscientious Objector (D.S.S. Form 47) showing that by reason of his "religious training and belief" he had acquired a deep religious conviction against his own participation in war. (R. 18-19, 63-66) Attached to said Form 47 was a typewritten statement (R. 69-70) in which petitioner again claimed Class IV-D and complete exemption as "ordained minister of Almighty God, preaching the Gospel of His Kingdom"; that he was a true follower of Christ Jesus and that his exclusive occupation was that of an ordained minister, that he had been one of Jehovah's witnesses for eleven years, actively preaching the Gospel from house to house and city to city; that he is a recognized "pioneer" minister of Jehovah's witnesses and the Watchtower Bible and Tract Society. He called attention to the fact that there was attached to his questionnaire (D.S.S. Form 40) a "Consolation" magazine No. 569 (issue of July 9, 1941, published by Watchtower Bible and Tract Society), in which appeared Selective Service System, National Headquarters Opinion No. 14² of June 12, 1941, declaring Jehovah's witnesses eligible for Class IV-D. Accompanying such opinion was a list of full-time ministers as of June 1, 1941, filed by the Watchtower Bible and Tract Society with National Headquarters of Selective Service System and duly certified by National Headquarters to all State Headquarters of the System. Provision is made in the opinion for consideration of those of Jehovah's witnesses whose names do not appear on the certified official list, for Class IV-D.³ Petitioner explained why his name did not appear on the certified official list; that he was on the sick list at the time the certification was made; that he had been a full-time minister before such list was prepared and had since re-

² This Opinion fully appears in the Appendix pages 36a to 39a.

³ *Op. Cit.* par. 5, Appendix page 39a.

entered active service. Petitioner explained that the purpose of his ministry was to "give a testimony before the people of the world that Jehovah is the Almighty God" and will establish a government in the earth "which shall rule the world in righteousness and bless the persons who are obedient to that Theocratic rule with life everlasting, peace, and happiness". Petitioner stated that "all sincere persons devoted to Jehovah, who are in a covenant to do His will and who have been accepted by Him as such servants are ordained ministers of Almighty God: and since God ordains me, that is the highest ordination or authority that man could have". Petitioner then quoted the same authority for ordination as did Christ Jesus when on earth.⁴ Petitioner declared that, as an "ordained minister, he was recognized by Jehovah God as one of the "royal priesthood" to "shew forth the praises of him who hath called you out of darkness into his marvellous light". (1 Peter 2: 9) Petitioner quoted from 1 John 5: 19 (*Emphatic Diaglott*): "The whole world lies under the evil one." He stated that, as one of the "royal priesthood", he could not indulge in the affairs of this world; that he was forbidden to engage in wars between nations; that as a minister and soldier of Christ, he did not war "after the flesh", and that the weapons of his warfare were not carnal. (2 Corinthians 10: 3, 4)⁵ That God commands that the Christian minister

⁴ *Isaiah 61: 1, 2*: "The Spirit of the Lord God is upon me; because the LORD hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the LORD, and the day of vengeance of our God; to comfort all that mourn." Cf. *Luke 4: 17-19*. Credentials of ordination, showing that petitioner was duly recognized by the Watchtower Bible and Tract Society—a recognized religious organization (S. S. Opinion No. 14)—as an ordained minister, and authorized to teach and preach as did Christ Jesus, were attached to Form 47 and appear in the record at page 67.

⁵ He also quoted 2 Timothy 2: 3: "Thou therefore endure hardness, as a good soldier of Jesus Christ."

be "unspotted from the world" (*James 1:27*) of which petitioner is not a part.⁶

Petitioner declared that Christ Jesus, as a witness and minister of Jehovah God, was entirely neutral, did not instruct His followers to take sides in any government, but emphatically instructed them to devote themselves exclusively to God's Kingdom. R. 69-70.

The clerk of the local board testified, upon this undisputed evidence, petitioner was classified in "Tentative I" by the board on August 25, 1941. (R. 11-12, 58) That petitioner appealed January 26, 1942. R. 11, 12.⁷

Petitioner timely appealed to the board of appeal on January 26, 1942, within ten days of the I-A classification, January 19, 1942. (R. 58)⁸ On appeal petitioner was continued in Class I-A, subject to the reference of his status as a conscientious objector to the Department of Justice. R. 58.

On June 17, 1942, the Board of Appeal unanimously classified petitioner in Class IV-E, a conscientious objector, liable for induction to do work of national importance. (R. 12, 58) On July 15, 1942, petitioner was reclassified unanimously by the local board in Class IV-E "as per classi-

⁶ *John 15: 17-19*: "I command you, that ye love one another. If the world hate you, ye know that it hated me before it hated you. If ye were of the world, the world would love his own: but because ye are not of the world, but I have chosen you out of the world, therefore the world hateth you."

John 17: 16, 17: "They are not of the world, even as I am not of the world. Sanctify them through thy truth: *thy word is truth.*"

⁷ *1 John 2: 15*: "Love not the world, neither the things that are in the world. If any man love the world, the love of the Father is not in him."

⁸ There is a discrepancy between the testimony of the clerk and the records of the local board. Petitioner did not appeal from a tentative class I, as no appeal is allowable from such classification. Petitioner was not placed in an appealable classification until January 19, 1942, at which time he was placed in Class I-A. R. 58.

⁸ There is a discrepancy between date of appeal and the action taken by the Appeal Board. The Appeal Board classified petitioner in Class I-A. January 24, 1942, whereas the actual date of his appeal to the Appeal Board was January 26, 1942. R. 58.

fication recommendation of the Appeal Board". R. 12, 58.*

In accordance with the directions of the State Director of Selective Service, the local board ordered petitioner on August 21, 1942, to report to the local board on September 2, 1942, for induction to do work of national importance under civilian direction. (R. 13-14, 59) Petitioner failed to report. (R. 15) Thereafter the local board notified him of his suspected delinquency and again ordered that he report for induction on September 8, 1942. (R. 16, 61) In response to this order, the local board received a letter mailed by the petitioner. R. 16, 62.

The court excluded, with exception to petitioner, certain documentary evidence appearing in his Cover Sheet and the files of the local board, to wit, a Certificate of Ordination issued to petitioner by the Watchtower Bible and Tract Society (R. 29, 71); a letter signed by petitioner (R. 31, 72); an affidavit made by John A. Paloney (R. 30, 73); a list of signators (R. 30, 74); an affidavit by Anthony De Fazio (R. 30, 76); and an affidavit by petitioner. R. 22, 31-32, 78-79.

Petitioner offered the testimony of Angelo Galuppo to prove that he was recognized as a duly ordained minister of religion and customarily performed duties as such, etc. (R. 34-36, 75) This offer was denied and the evidence excluded with exception to petitioner. (R. 36) Petitioner offered himself as a witness to prove that he was customarily serving as a duly ordained minister of religion and recognized as such. (R. 36-38) That on the occasion of his application for a hearing before the local board to discuss his classification, the appearance was denied and a member of the board, a "recognized" clergyman, stated on such oc-

* Petitioner had exhausted his remedies under the Selective Service Regulations (s. 627.26, Appendix page 24a), no further appeal being allowable because there was no dissenting vote by the appeal board which had ordered the IV-E classification after considering petitioner's claim. The IV-F classification, dated January 5, 1943 (R. 38), was subsequent to the trial and conviction. (R. 8, 80-81) It was given because of his conviction. See Reg. s. 622.61, 622.62, Appendix page 18a.

casion, "I do not have any damned use for Jehovah's witnesses." R. 32-33.¹⁰

At the close of the evidence and after argument of counsel the court charged the jury, *inter alia*, that the classification of the local board was binding upon the court and jury, that such classification could not be questioned, that the only way petitioner could question the classification would be to report for induction and then apply for a writ of habeas corpus, and that the jury had nothing to do with the question of whether or not petitioner was properly classified. (R. 40-42) Petitioner duly objected to the charge. R. 42-43.

The jury retired and returned a verdict of "guilty". (R. 43) After making a statement in his own behalf (R. 43-48) petitioner was sentenced to confinement in a federal penitentiary for five years. (R. 48) Petitioner duly and timely filed notice of appeal to the Circuit Court of Appeals accompanied by grounds relied upon. (R. 83-85) There was timely filed assignment of errors made the basis of the appeal and the questions presented upon this petition for writ of certiorari. (R. 85-99) All assignments of error were overruled by the Circuit Court of Appeals because, "The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary or capricious manner are not defenses to a prosecution under the Act for a failure to comply with the board's order."¹¹

¹⁰ Reg. s. 623.1 (c), 625.1, 625.2. Appendix pp. 19a-22a.

¹¹ *United States v. Grieme*, 128 F. 2d 811, 815.

Specification of Errors to be Urged

Petitioner intends to urge assignments of error numbers two to eleven, inclusive. R. 88-99.

In substance these assignments of error are:

1) Did the trial court commit error in denying petitioner's motion for dismissal because the government's evidence and the undisputed evidence showed that petitioner was exempt from all service, that the local board did not have jurisdiction and acted contrary to law, arbitrarily and capriciously in considering petitioner's claim for classification?

2) Did the trial court commit error in excluding petitioner's offer of documentary evidence appearing in his Selective Service Cover Sheet and the records of the local board showing that he was an ordained minister of a recognized organization and customarily serving as such and thus exempt from all service under the Act?

3) Did the trial court commit error in excluding from the evidence petitioner's offer of testimony showing that local board denied a hearing on personal appearance and expressed prejudice in consideration of petitioner's classification, contrary to the Selective Service Regulations?

4) Did the trial court commit error in charging the jury, over objection and exception of petitioner, that the jury could not consider whether or not the classification was illegal, that it was binding upon the court and jury, that such classification could not be questioned, that the only way petitioner could question the classification would be to report for induction and then apply for writ of habeas corpus, and that the jury had nothing to do with the question of whether or not petitioner was properly classified, thus instructing the jury to find the petitioner "guilty"?¹²

¹² The court said "it would be your duty to find him guilty". R. 41.

5) Did the trial court commit error in refusing petitioner's requested charges to permit the jury to consider whether petitioner was exempt from all service under the Act because a minister of religion, and whether the board acted arbitrarily, prejudicially and capriciously in denying petitioner's claim for exemption?

Preliminary Statement

While the violent hurricane of totalitarian-prosecuted war tore through Europe there was introduced simultaneously in the House and Senate the belated Burke-Wadsworth Bill. It was passed by both houses and signed by the President on September 16, 1940, thereby becoming the Selective Training and Service Act of 1940 [54 Stat. 885, 50 U.S.C. Appendix, ss. 301-318]. It was an act to provide for the common defense by increasing the personnel of the armed forces. As amended, the Act requires the registration of all male citizens between the ages of 18 and 65.¹³ It makes liable for training and service all persons between the ages of 18 and 45,¹⁴ provides for deferments during peacetime of certain persons who have served in the armed forces, who are members of the National Guard, who are members of the Officers' Reserve Corps, during the war as well as peacetime, defers training for the vice-president of the United States, governors of the various states, members of the legislative bodies of the United States and of the several states, judges of the courts of record of the United States and of the several states, and of the District of Columbia, those employed in certain industries, married men and persons with dependents, and college students.¹⁵

¹³ Act, s. 2, Appendix p. 1a.

¹⁴ Act, s. 3 (a), Appendix pp. 1a-2a.

¹⁵ Act, s. 5 (b), subs. 2, 3, 4; s. 5 (c), subs. 5 (e) and (f). Ap. pp. 3a-6a.

It is noticed that conscientious objectors are neither deferred nor exempt from training and service.¹⁶

Complete exemption from all training and service under the Act is granted to "regular or duly ordained ministers of religion".¹⁷ All that is required of such ministers under the Act is to register. The exemption from training and service under the Act does not, however, continue after the cause therefor ceases to exist.¹⁸ The Act provides for the creation, establishment and operation of the Selective Service System.¹⁹ It is divided into two distinct branches, operational and administrative. The operational branch consists of the local boards, boards of appeal, and presidential appeal.²⁰ The administrative branch consists of the National Headquarters and State Headquarters.²¹ The operational branch has the power of determining classification of registrants affecting their liability for training and service or deferment.²² The administrative branch has no authority to classify individual registrants but rather promulgates rules and regulations prescribed by the President or the Director, acting for the President, and generally administers the conduct of the Selective Service System

¹⁶ Act, s. 5 (g), which provides that if one objects to combatant training and service he shall be assigned, when inducted, to noncombatant service in the military forces, and if he is opposed to both combatant and noncombatant service, he shall be assigned to work of national importance under civilian direction. The section further provides for appellate procedure by reference to the Department of Justice in the event of a denial of claim as conscientious objector. Reg. s. 622.12-622.14, 622.51, 652.1, 652.2. See Appendix pp. 6a-7a, 16a, 17a, 29a-31a.

¹⁷ Act s. 5 (d), Reg. s. 622.44, Appendix pp. 4a, 17a. Ministers of religion were not required to serve under the Militia Act of 1792, nor the Act of 1812. They were specifically exempt under the Act of March 3, 1863 (12 Statutes at Large 731). The Selective Training Act of 1917 specifically exempted ministers of religion.

¹⁸ Act s. 5 (h), Appendix p. 7a.

¹⁹ Act s. 10 (a) Appendix p. 8a.

²⁰ Act s. 10 (a) (2). Cf. Reg. s. 603.21, 603.22, 603.24, 603.52, 603.54, 628.1, 628.2. See Appendix pp. 8a-9a, 13a-15a, 24a-25a.

²¹ Act s. 10 (a) (2). Cf. Reg. s. 603.1, 603.11, 603.12. See Ap. pp. 8a, 12a, 13a.

²² Reg. Parts 622 and 623. Appendix pp. 16a-19a.

as a governmental administrative agency. The National Headquarters, in addition to promulgating regulations, issues directives, memorandums and opinions construing the Act and regulations and stating how they shall be applied to certain persons. Within that administrative system it is claimed that the decision of the local board, subject to review by the appeal board and appeal to the President, is final.²³ It is within the discretion of the administrative branch to reopen or reconsider a case, take an appeal, postpone an induction or other similar actions, which do not constitute a determination of the merits, but merely bring into play the administrative procedure.

Neither petitioner nor Jehovah's witnesses consider the Selective Training and Service Act as unconstitutional. It is within the province of a nation to arm itself and resist attack or invasion.²⁴ It is admitted that the government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so *lubricate* the war machinery as to keep it working effectively.

Conscription of man power for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service.²⁵ Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites".²⁶ Twenty-three thousand of the first registration were completely exempt according to statistics.²⁷ Under this system of raising and maintaining an army the Jewish nation fought many battles

²³ Act s. 10 (a) (2). Also Reg. s. 627.26. See Appendix pp. 8a, 24a. This, however, does not affect the scope of review and authority by the judicial power of the government to review the determinations of the administrative or operational branches of the System.

²⁴ *Salvation*, p. 279, Watchtower Bible & Tract Society, 1930.

²⁵ *Numbers* 1: 1-3, 45, 46; 2: 32-34; 26: 1, 2.

²⁶ *Numbers* 1: 47-54; 2: 35.

²⁷ *Numbers* 26: 62.

and gained many victories.²⁸ Since the destruction of the Jewish nation, Jehovah's witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's Kingdom, as witnesses to proclaim The Theocracy, the only hope of the people of good-will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one individually, for himself, determines what course he must take according to the perfect Word of God. As one of the "royal priesthood", petitioner, like the *Levites*, claims complete exemption from military service according to the provision of the Act because he is an ordained minister of the gospel of God's Kingdom. This position of strict neutrality is the position taken by everyone who faithfully and strictly follows in the footsteps of Christ Jesus and preaches the gospel as did He and His apostles, according to the Holy Word of God.²⁹

The record of secular history shows that the early Christians made the same claim of complete exemption from military service required by the Roman Empire.³⁰ For this

²⁸ Act s. 10 (a) (2). Also Reg. s. 627.26. See Appendix pp. 8a, 24a. This, *cles chapter 20; Judges 3: 8-30; chapters 4 and 1; 7: 19-22.*

²⁹ R. 69-70. See also "Consolation" magazine [No. 551, Oct. 30, 1940] and "Neutrality" booklet, published by Watchtower Bible and Tract Society, referred to by petitioner in his D.S.S. Form 47.

³⁰ Henry C. Sheldon, *History of the Christian Church*, 1894, Crowell & Co., New York, p. 179 *et seq.*; E. R. Appleton, *An Outline of Religion*, 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.*; Capes, *Roman History*, 1888, Scribner's Sons, New York, p. 113 *et seq.*; Willis Mason West, *The Ancient World*, 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.*; Capes, *The Roman Empire of the Second Century*, Scribner's Sons, New York, p. 135 *et seq.*; Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*; Hayes & Moon, *Ancient and Medieval History*, 1929, The Macmillan Company, New York, p. 432; Willis Mason West and Ruth West, *The New World's Foundations in the Old*, 1929, Allyn & Bacon, New York, p. 131; Joseph Reither, *World History at a Glance*, 1942, Garden City Publishing Co., Inc., New York, p. 102; Francis S. Betten, S. J., *The Ancient World*, 1916, Allyn and Bacon, Boston, p. 541, *et seq.*

claim they were cruelly persecuted.

Petitioner does not ask for that which is not allowed by the law. He claims to be and is within the law. Petitioner has been denied his exempt status and wrongly classified by the local board. He has a right to test the validity of the board's order. The only way it can be tested, without surrendering his rights and violating his covenant with the ever-living God, is to present the controversy to the federal courts through defense to the indictment returned. *This is not defying or flouting the law, but, rather, complying with the law.*

It is for this Court to determine whether or not the local board complied with the law or whether the petitioner complied with the law.

To defend in courts is not defying the law. Petitioner respects the law of the land and this Court. That is why he brings the controversy here for determination.

Summary of Argument

The Selective Training and Service Act provides that any person who shall "knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules of regulations made pursuant to this Act... shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . . No person shall be tried by any military or naval court-martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act . . ." [50 U. S. C. s. 311]

There is no provision limiting the defenses or otherwise proscribing the procedure for the prosecution of alleged violations under the act in the district courts. It must be assumed that the general rules and customs prevailing in

the United States District Courts for the trial of ordinary criminal cases were intended by Congress to apply to such prosecutions. Accordingly the plea of "not guilty" would raise any issue as to the validity of the indictment, or the induction order on which it was based or any other defense. Should there be no duty upon the defendant under the Act in defense to the indictment he could urge it. The defendant is not required to surrender his rights as a citizen entitled to a hearing and submit to the jurisdiction of the military, naval or other authorities before he can question the classification given him by the local board.

Since Congress intended that the prosecutions of persons not inducted should be had in the district courts it must be assumed that Congress also intended that the defendant in any such prosecution would have the right to defend that 'no duty was required of him under the act'. The courts are jealous to guard against any encroachment upon the right of the accused to be fully heard. It is a custom to permit full defense in the trial of criminal cases. "Usages long established and followed have to a great extent the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments." (*Slidell v. Grandjean*, 111 U. S. 412, 421; *United States v. Arredondo*, 6 Pet. 691, 714) The statute must be construed so as not to lead to oppression and absurd consequences. (*United States v. Kirby*, 7 Wall. 482, 486-487; *Sorrells v. United States*, 287 U. S. 430, 446; *United States v. American Trucking Ass'n*, 310 U. S. 534; *Continental Casualty Co. v. United States*, 314 U. S. 527, 533) If the statute is construed so as to deny one the right to make a defense it would lead to unreasonable and unjust conclusions contrary to the policy of Congress and the American system of jurisprudence. Congress did not contemplate that one should report to the army, navy or civilian authorities pursuant to an order of a local board and then apply for a writ of habeas corpus before the district court as the only means of deter-

mining if "any duty" is "required" of the individual. The very fact that prosecutions are provided for in the district court presupposes the right of a defendant to show that he was under no duty to comply with the order of the local board. From time immemorial an individual has been accorded the right to defend on the "field of battle" and return blow for blow and repel an assault at the place where he meets his adversary. In this instance the battle arena was the United States District Court. To hold otherwise is to arbitrarily tie the hands of the innocent and hobble the victim in court to be destroyed mercilessly and defenselessly. Such cruel, unusual and alien doctrines have no root in the jurisprudence of this land and were not intended by Congress in providing for prosecutions in the district court.

The authorities under the 1917 Act holding that habeas corpus was the only available remedy to draw in question the action of the draft board by an inductee questioning the action of the board do not control the nature and extent of the defenses available to a registrant under the Act of 1940, because the two statutes are essentially different. The status of a registrant under the present act is vastly distinct and contrary to the status of an inductee under the 1917 Act. Under the latter act the registrant was subject to military jurisdiction and treated as a deserter from and after failure to report for induction. Being under military jurisdiction it was impossible to be prosecuted in the district courts for violation of the Act. There were no criminal prosecutions in the district courts under the 1917 Act for failure to report. All such were heard by the military court-martial. The only remedy available in the district courts was habeas corpus for one desiring release on account of an erroneous classification. The main reason that Congress in 1940 provided for prosecutions in the district court was to keep these controversies out of the jurisdiction of the army as much as possible and to avoid the tragedies that resulted from the operation of the 1917 Act. Since one not

"actually inducted" is not subject to military jurisdiction it is plain that such a person must be prosecuted in the district court for an alleged violation. He cannot be required to sacrifice and surrender his fundamental right to defend the criminal action because he failed to submit himself to the military jurisdiction. Congress did not intend such absurd, unreasonable and confiscatory results.

By providing that one not actually inducted could be prosecuted for failure to perform a duty under the act it is assumed that Congress intended that acts of the local boards were *final orders*, sufficient to confer jurisdiction upon the district courts when the registrant failed or refused to report for induction. The order to report for induction is a final order. There is no appeal from it to higher authority in the Selective Service System after classification is finished. It is the end of the administrative process. Failure to comply with same authorizes the local board to report the registrant as a delinquent. A delinquent is one who refuses to comply with a lawful order of the board without just cause or excuse. Certainly Congress intended that in defense to the indictment one could prove that he was not a "delinquent" by showing he had just cause for not reporting.

If the classification and order to report are sufficient to base an indictment upon, then they are sufficiently *final* administrative orders to permit judicial review of their invalidity, especially in defense to an indictment based thereon. The rule of non-judicial review of interlocutory and preliminary orders made by administrative agencies does not apply to bar a defense to the indictment.

The attack of the classification and order in defense to an indictment is not a collateral attack but is a direct assault against and in the same proceedings brought by the government to enforce the same. Conceding for purposes of argument that it may be considered a collateral attack, the action of the local board is void because the petitioner was

exempt by Act of Congress from duty under the Act because an ordained minister of religion. The action of the board was void everywhere and its invalidity could be shown in any proceedings. (*Wise v. Withers*, 3 Cranch 329, involving action under the Militia Act of May 8, 1792, by a military tribunal.)

In determining the defense of exemption from any duty required by the act the court must make a *de novo* inquiry because such involves the jurisdiction of the local board to induct petitioner. Whether the trial is *de novo* or the inquiry is confined to a review of the record made before the local board, the measure of inquiry or extent of judicial review must be governed by the ordinary rules of criminal procedure which do not allow the review to be limited to the extent that review of administrative determinations is narrowed in civil actions. This inquiry must be broader than that permitted in civil actions, so as to preserve the rights of an accused in a criminal action with respect to burden of proof, presumption of innocence, degree of proof, reasonable doubt, etc.

Assume that procedural rules established for review of administrative determinations in civil actions must apply. The defense of exemption from duty under the act is a jurisdictional fact which should be determined *de novo* by the court and there must be substantial evidence against the claim of exemption to support the jurisdiction of the board to induct. If the rule of review of such determinations in civil cases applies it is the duty of the court to set aside the conviction if it appears that the boards' order (1) departed from applicable rules of procedural law, (2) departed from or was contrary to substantive law governing the matter, (3) had no basis in substantial evidence or is contrary to the undisputed or overwhelming preponderance of the evidence, or (4) was arbitrary and capricious. The record, when viewed most favorably to the government, sustains each of the foregoing charges against the determination

of the Selective Service System overruling his claim for exemption as a duly "ordained minister of religion" under Section 5 (d) of the Act and Sec. 644.22 of the Selective Service Regulations.

The question presented here is much stronger than it would have been if petitioner claimed some classification within the administrative discretion to fix and allow, such as physical disability, essential occupation, etc. Here is involved one who is exempt by Act of Congress from service. His status is such as to affect the jurisdiction and power of the boards to act. The rights of petitioner depend on Act of Congress and not the discretion of the Selective Service System.

The action of the trial court in denying petitioner his right to urge this defense of 'no duty to perform under the act' in response to the indictment and in making certain procedural rulings was equivalent to subjecting petitioner to a trial by "ordeal" and was an illegal surrender of the judicial power of the court. Petitioner was tried and convicted before the draft board. The courts below acted only as the *rubber stamp* or ministerial sentencing agent for the boards. It was the duty of the court judicially to consider petitioner's various claims. The action of the trial court in brushing aside defenses thus did not constitute due process of law, and petitioner's fundamental right under the procedural law in criminal cases was grossly violated.

Points for Argument

ONE

This Court should hold that petitioner, on trial for an alleged violation of the Selective Training and Service Act charged with disobedience of the local board's induction order, can urge as a defense to indictment the invalidity of the induction order, because the undisputed evidence showed he was a minister of religion exempt from induction for service of any kind under the Act and that all rulings of the court below based on the proposition that such defense is not available should be reversed.³¹

TWO

This Court should hold that the indictment should have been dismissed upon the petitioner's motion for dismissal at close of the government's case or *sua sponte* at the close of the evidence because the undisputed evidence showed that petitioner was a minister of religion completely exempt from induction for service of any kind under the Act and the board had no jurisdiction; therefore the order of the local board is void and the government wholly failed to prove a violation of the Selective Training and Service Act.³²

³¹ This point supports all propositions of law urged under assignments of error numbers 2 to 11, inclusive. R. 88-99.

³² This point supports assignment of error number 2. R. 88-99.

THREE

This Court should hold that the trial court erred in charging the jury that petitioner could not challenge the validity of the induction order because the determination by the local board was binding upon the court and jury."

FOUR

This Court should hold that upon the trial of the indictment petitioner was entitled to have the trial court give requested charges submitting his defense that if the jury found petitioner was a minister of religion and that the local board had notice thereof from his Selective Service questionnaire, or if the jury found that the board had such notice, the jury should return a verdict of "not guilty".³³

FIVE

This Court should hold that upon the trial of the indictment petitioner was entitled to have the trial court give requested charges submitting his defense that if the board was prejudicial, unfair, arbitrary and capricious in making his classification, the jury should return a verdict of "not guilty".³⁵

³³ This point supports assignment of error number 10. R. 97-98.

³⁴ This point supports assignment of error number 11. R. 98-99.

³⁵ This point supports assignment of error number 11. R. 98-99.

SIX

This Court should hold that upon the trial of the indictment petitioner was entitled to have the jury consider oral testimony and documentary evidence offered by petitioner to show that he was regularly practicing as a minister of religion and that the local board had notice of such status before classification.³⁶

SEVEN

This Court should hold that upon the trial of the indictment petitioner was entitled to have the jury consider oral testimony offered by petitioner to show that the local board denied him a hearing on personal appearance and that the members were prejudiced against petitioner.³⁷

³⁶ This point supports assignments of error numbers 3, 4, 5, 6, 7 and 8. R. 90-96.

³⁷ This point supports assignment of error number 9. R. 96-97.

ARGUMENT

ONE

This Court should hold that petitioner, on trial for an alleged violation of the Selective Training and Service Act charged with disobedience of the local board's induction order, can urge as a defense to indictment the invalidity of the induction order, because the undisputed evidence showed he was a minister of religion exempt from induction for service of any kind under the Act and that all rulings of the court below based on the proposition that such defense is not available should be reversed.³⁸

A

Since the Magna Carta and the Bill of Rights, in the British and American courts history shows that the accused, upon the trial of any criminal charge, may urge without limitation any and all defenses that are available under the law and procedure. This fundamental right was denied petitioner by the lower courts.

The rule in the *Grieme* case (*United States v. Grieme*, 128 F. 2d 811) is the most devastating and sweeping change of procedure in criminal cases that has ever been announced by any court in America. In one broad step it takes away the fundamental inherent rights of making a defense. The decision is arbitrary because the court relies on no rule or reason, and says that policy justifies the conclusion. From time immemorial the law has recognized that any available defense can be made on the trial of an indictment under the plea of "not guilty".

³⁸ This point supports all propositions of law urged under assignments of error numbers 2 to 11, inclusive. R. 88-90.

In the celebrated *Doctor Bentley's Case* (*Rex v. Cambridge University*, 1718; 1 Strange 557, 567), a hearing and defense was denied upon the trial involving the validity of an illegal writ. Justice Fortesque in that case said: "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam (says God), where art thou? Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also."³⁹

The right of making a defense is the only way that the judicial system can maintain respect and avoid sliding into oblivion. The Mosaic law allowed a defense.⁴⁰ Even the barbarians and ancients permitted a hearing and a defense. The Roman philosopher and lawyer, Seneca, in the days of Nero, wrote: "Who hath adjudged of aught, one side unheard, just though the judgment, were himself unjust."

The degeneration of the judicial system under the influence of the *Holy Roman Empire* through trials by ordeal was arrested in England and banished for ever when the people compelled King John to put his hand to the *Magna Carta*, the 39th chapter of which provides that: "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

A full hearing and the right to present all defenses is as much established as a part of *due process* of law in criminal procedure as the Bill of Rights is established in the Constitution. McGehee, in his work, *Due Process of Law*, says: "The requirement of conformity to the law of the

³⁹ *Genesis* 3: 9, 11, 13; *Joshua* 7: 19-21; *Esther* 8: 7-14; *Daniel* 3: 10-25; *John* 18: 29-38; *Acts* 24: 1-26.

⁴⁰ *John* 7: 51. Cf. *Deuteronomy* 1: 16, 17; 17: 8.

land' was intended as a guaranty against certain arbitrary proceedings on the part of the king, the enforcement of execution without any judgment, or after a mere pretext of judgment; and that the most that was guaranteed was judgment by some of the known contemporary methods of trial, ordeal, battle, or compurgation. [page 5] ...

"Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or 'due process of law', but the ideal was not confined to one system of jurisprudence, and was common to thoughtful men everywhere [page 73]."

Justice Cooley, in his *Constitutional Limitations*, says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.' " [p. 736, 8th Edition]"

The denial of the right to present the defense to the indictment that the induction order is void, is a modern-day trial by ordeal, which pulls the judicial system of the federal courts far back, beyond the date of its beginning, into the Dark Ages of the Inquisition. To limit the defense to whether the defendant reported for induction convicts the defendant before he is tried, and without trial. It is admitted that the petitioner did not report for induction. The rule in the *Grieme* case, therefore, falls squarely within the definition of trial by ordeal. Says the *Encyclopedia Americana*: "The following ordeals were anciently in vogue throughout Europe: The duel or wager of battle, in which the conquered was held guilty; the ordeal of fire; of water; the corsned;

⁴¹ *Dartmouth College v. Woodward*, 4 Wheat. 519; *Works of Webster*, Vol. V, p. 487.

the trial of the eucharist; the test of the cross; and the judgment of the bier. In the ordeal of fire the accused walked barefooted over coals of fire, or over red-hot plowshares; or had to carry a red-hot iron in his hand; or was made to walk through fire; in the last case he was dressed in cloth covered with wax (the trial of the waxen shirt); if he was unhurt by the fire and the wax unmelted, he was considered innocent. In the trial by cold water (often applied to witches) the test would be whether the accused sank or floated; if the latter, he (or she) was guilty; or the suspected party had to put his hand into boiling water and lift something out." [Vol. 20, (1942 edition) p. 752.]

The history of trial by ordeal is also discussed briefly by this Court in *Hurtado v. California*, 110 U. S. 516, 529.

The rule established in the *Grieme* case, therefore, makes it literally impossible for a defendant to obtain an acquittal under an indictment charging him with violation of the Selective Training and Service Act. When this Court was in its infancy, it declared that no defendant shall be bound until he shall have had his day in court and been given an opportunity to be heard. See *Bradstreet v. Neptune Insurance Co.*, 3 Sumn. (U. S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

In *Windsor v. McVeigh*, 93 U. S. 274, plaintiff's property had been taken from him by the agents of the federal government. In ejectment proceedings his answer was stricken and he was denied a hearing. The Court, at pages 277 and 278, said: "Wherever one is assailed in his person or his property, *there he may defend, for the liability and the*

right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. . .

" . . . But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether. It would be like saying to a party, Appear, and you will be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence." [Italics added]

B

The right of petitioner to present his defense to an indictment charging a violation of the Selective Training and Service Act should be as broad as the avenue of defense, under plea of "not guilty", in other prosecutions within the jurisdiction of the federal courts.

Title 28 U. S. C. 41 (2) confers jurisdiction upon the district courts "over all crimes and offenses cognizable under the authority of the United States". The rule in the *Grieme* case makes void this statutory provision. It closed to the petitioner the doors of the court and denied him his "day in court". Nothing can be more foreign to criminal

procedure than to bar the very facts which the court must determine in deciding whether or not the statute is applicable. The statute must be applicable before there can be a violation. If the acts are exempt from the statute, it is not applicable and there can be no violation. The courts below destroyed and denied a defense which the petitioner had in fact and by Act of Congress. He is forced to undergo a *trial by ordeal* by answering the question: "Did you report?"

Throughout history of the federal courts there has been recognized the fundamental established rule that defenses in the nature of confession and avoidance were available in criminal cases. Self-defense in murder, manslaughter and assault cases; justifiable homicide when committed by an officer in the course of official duty; the defense of consent in rape cases; the defense of insanity, are all available. The *Grieme* rule could easily be extended so as to deny all of these recognized and established defenses and convert criminal trials in federal courts into *trials by ordeal*. No longer would it be said, "Did the defendant take life in self-defense?" but the jury could consider only, "Did the defendant fire the gun and did the bullet enter the body of the deceased and cause his death?" No longer would the question be, "Were you pushed into a corner? Were you provoked?"

Even barbarians recognize the law of self-defense. Self-preservation is the first law of nature. The law of Almighty God guarantees the privilege of self-defense and the defense of home and permits the taking of life to protect the same.⁴² The arbitrary curtailment of defenses through the *Grieme* rule brands and condemns the innocents and fills the penitentiaries with Christians even though they be not guilty.

The new theory grafted onto criminal jurisprudence can logically be stretched to exclude the defense of *alibi* in criminal cases. It would prevent a man charged with cow theft from proving that some third person stole the cow. Under the *Grieme* rule the court could say, "The third per-

⁴² *Exodus* 2: 11, 12; 22: 2; *Nehemiah* 4: 13, 14; *John* 2: 15, 16.

son is not on trial. The question here is whether or not you stole the cow." Such a rule shifts the entire foundation of criminal procedure and turns the law upside down.

The unreasonableness and ridiculousness of the *Grieme* rule becomes manifest when it is applied to the Government's case. Suppose it was necessary that the Government be required to show that the order to report for induction is valid. Petitioner says the Government must make such proof by introducing the Selective Service Questionnaire, etc. For the sake of argument assume that the petitioner's claim is correct. If the rule in the *Grieme* case bars the petitioner from proving the order invalid, then, *a fortiori*, the same rule could be applied against the Government so as to deny the Government the right to prove that the order is valid. "What's sauce for the goose is sauce for the gander." Under no circumstances would the Government consent to such a rule. It would vigorously protest before this Court that such a rule was capricious, yea, unconstitutional! The Government argues that policy does not allow a citizen to defy the law by refusing to obey the order. Petitioner says that policy does not permit the local board to defy the law. When there is a controversy, there is only one place to settle it, and that is in the courts. Defiance of law has never been held to justify the denial of right to make a defense. Even the worst criminals, murderers, robbers, thieves, embezzlers, rapists, and all others, are allowed to make their defense, despite the fact that they flout and defy the law in the most gruesome or cruel manner. Why should policy demand that a different rule be applied in reference to cases of this sort?

Section 11 of the Selective Training and Service Act⁴³ provides for the trial of one who has not been inducted and who has been charged with knowingly failing or neglecting to perform any duty required of him under the Act, or the rules and regulations promulgated thereunder. There is

⁴³ Appendix pp. 10a-11a.

no provision of the statute limiting the defenses. Failing so to limit, it must be assumed that Congress intended that the general rules of criminal procedure allowing full defense would apply. To hold otherwise makes the statute unreasonable."

Section 601.5 of the Selective Service Regulations provides that a delinquent is one who "has no valid reason for having failed to perform that duty". Of necessity this provision means that *if one has a valid reason he can prove it!* The best possible, valid, reason would be that the order is void and that the board acted contrary to law. Surely Congress did not intend to bar the showing of such invalidity. The very fact that Congress did not make provision for a review by certiorari, mandamus or other remedy, and made provision for trial of alleged violations by indictment in the district court, clearly implies that all defenses can and must be urged in criminal prosecutions. No reason of convenience is sufficient to support it. No rule of law can be advanced by the government why exemption of the registrant or invalidity of the order cannot be urged in the trial of an indictment.

From the beginning of the functioning of the executive department, administrative boards have been created to exercise certain executive or quasi-judicial powers delegated to them by Congress. Eleven such trace their beginning from the year 1789 to the close of the Civil War. Since that time administrative agencies have increased with the expanse of the Statutes at Large, until this day there are to be found scores, if not hundreds, of administrative agencies performing quasi-judicial functions within the executive

⁴⁴ *United States v. Kirby*, 7 Wall. 482, 486, 487; *Sorrells v. United States*, 287 U. S. 435, 446; *United States v. American Trucking Ass'n*, 310 U. S. 534; *Helvering v. Hammel*, 311 U. S. 504, 510; *Ozawa v. United States*, 260 U. S. 178, 194; *Bank of Columbia v. Okely*, 4 Wheat. 235; *United States v. De la Maza Arredondo*, 6 Pet. 691; *United States v. St. Paul M. & M. R. Co.*, 247 U. S. 310, 313; *Cole v. Vincent*, 285 U. S. 22, 62; *Wright v. Vinton Branch of M. Trust B'k of Roanoke*, 300 U. S. 440; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407.

branch of the Government. Hundreds of controversies that have not been settled before these agencies have been brought into federal courts by one way or another. A search of the reports does not reveal cases decided by this court where there has been *criminal* prosecution for failure to obey an administrative order.

The criminal and civil contempt cases on account of violating an injunction by this court are not analagous.⁴⁵ In those cases there was a prior judicial hearing and the party had a right to appeal from the injunction. Here the petitioner is convicted for contempt of the local board. There is no provision in the law authorizing the administrative agency to convict one for contempt, yet the district court committed him for contempt of the board. The power given administrative agencies is to apply to the federal court for a contempt order. There must be a judicial hearing and the respondent is given an opportunity of a complete, full and fair hearing and is denied no defenses. The contempt cases support the proposition that a defense can be made to show that the order is void. Thus, if the court does not have jurisdiction, or has no statutory authority for such an order, it can be collaterally attacked on an appeal from the order adjudging one in contempt.⁴⁶

If a citizen of the United States who has been illegally deported without an opportunity for a hearing in the federal courts in the manner usually prescribed, and re-enters

⁴⁵ *Höcat v. Kansas*, 258 U. S. 181, 189-190; *McLeod v. Majors*, 102 F. 2d 128, 129 (C.C.A. 5); *Locke v. United States*, 75 F. 2d 157, 159 (C.C.A. 2); *McCann v. New York Stock Exchange*, 80 F. 2d 211, 214 (C.C.A. 2) certiorari denied, 239 U. S. 603. Cf. *Cobbledick v. United States*, 309 U. S. 323, 327-328, saying that the defense was available to a witness.

⁴⁶ *In re Burrus*, 136 U. S. 586, involved a proceeding for habeas corpus to obtain custody of a child. The petitioner violated the order of the court and was adjudged in contempt. This Court held that federal courts had no jurisdiction over such controversies and ordered the petitioner discharged. See also *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16, where petitioner was adjudged in contempt for failure to comply with an order directing a physical examination. It was held that a party was entitled to attack the contempt order on appeal.

the country after such déportation, is indicted for such illegal entry, he can, to the criminal prosecution for illegal entry, make a defense that he was a citizen, despite the findings and order of the Department of Justice.

Under a prosecution for alleged violation of the British National Service (Armed Forces) Act, 1939, 2 & 3 Geo. 6. Ch. 81, petitioner would be entitled to make his defense as a minister of a recognized religious organization in Britain. The provision for complete exemption of ministers of religion does not deny the British courts the right to consider the question of exemption. Section 5 (12) of the National Service Act denying judicial review applies only to classifications within the administrative discretion of the local tribunals. It does not make the Act applicable to a person exempt from the provisions thereof. Indeed, under the British Military Service Act of 1916 containing similar provisions as the present Act, it has been held that a regular minister was entitled to question his classification under the trial of a criminal complaint charging him with violation of the Act for refusal to be conscripted.⁴⁷

Cases decided by this Court and other American courts on analogous situations indicate that defense to an indictment charging violation of an administrative order is expanded as broadly as the defenses allowable in any other criminal case or in civil actions brought to review the administrative order. The Act of Congress of March 1, 1875, providing that a judgment of conviction, against principal felons in an embezzlement conspiracy, should be conclusive against the receiver in determining that the property had been embezzled, stolen or purloined. Because it denied a hearing and trial this statute was held to be a violation of the Constitution.⁴⁸

The statutes defining the criminal jurisdiction of the

⁴⁷ See *Hawkes v. Morey*, 86 L. J. K. B. 1530, 116 L. T. 306, 81 J. P. 186, 15 L. G. R. 420, 25 Cox C. C. 689, 33 T. L. R. 308-D; *Offord v. Hiscock*, 86 J. L. K. B. 941, 81 J. P. 179, 15 L. G. R. 513-D.

⁴⁸ *Kirby v. United States*, 174 U. S. 47 [1899].

federal courts do not permit conviction upon *ex parte* orders to report for induction.⁴⁹ *Edwards v. United States*, 312 U. S. 473, involved a criminal prosecution by indictment. The petitioner was dealing in spurious securities. Certain facts had been before the Securities Exchange Commission. An analogous proposition was urged so as to deny the accused the right to make his defense. In that case, at page 482, the Court said: "In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a part of the records of the agency. The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX.

"The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

In *Hagar v. Reclamation District No. 108*, 111 U. S. 701, the Court said: "The assessment under consideration could,

⁴⁹ "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination." *Dowdell v. United States*, 221 U. S. 325, 330 [1911]. See also *Diaz v. United States*, 223 U. S. 442 [1912].

by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded." In *California v. Latimer*, 305 U. S. 255, it was intimated that one charged by indictment with refusal to comply with an administrative order would be permitted to defend and show that the act under which the order was made does not apply to the defendant. That case involved an original action by the State of California against the Railroad Retirement Board and the Commissioner of Internal Revenue to enjoin enforcement of the Railroad Retirement Act which provided: "Any officer or agent of an employer, . . . who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of Section 10 (b) 4, by the Board . . . shall be punished by a fine of not more than \$10,000 or by imprisonment not exceeding one year." The bill was dismissed for want of equity. Mr. Justice Brandeis said, among other things: "Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, as provided in Sec. 10 (b) 4; and in any suit which it may institute to enforce the regulations, ample opportunity is afforded to defend, on the ground that the State Belt Railroad is not subject to the Railroad Retirement Acts."

Where a criminal statute requires the proof of the doing of an act willfully, this Court has held that the refusal to comply with a statute or treasury order would not be termed willful, even where the refusal was based on an honest belief that the act was not applicable to the defendant.⁵⁰ This implies that a defendant could offer evidence to prove such defense. Furthermore the plea of "not guilty" raises, by general issue, all issues in the case without further form or ceremony.⁵¹

⁵⁰ *United States v. Murdock*, 290 U. S. 389, 394-396.

⁵¹ *United States v. Murdock*, 284 U. S. 141. The plea of "not guilty" puts at issue every material allegation in the indictment, and each essential element of the crime described in the statute.

The burden of proof is upon the government to prove every essential element of the crime described in the statute. It does not shift to the defendant in a prosecution of an indictment under the Selective Training and Service Act.⁵²

Fire Department of City of New York v. Gilmour, 149 N. Y. 453, involved an action to enforce criminal penalties for failure to obey an order of the fire department. The trial court excluded defendant's evidence on the ground that the order was conclusive and defense could not be urged in a criminal action. The New York Court of Appeals said: The justice refused to hear the evidence, saying 'The question before the court is, has there been a refusal to comply with the order of the board? The court regrets that it can't go into the question whether the order was necessary or whether the department acted properly.'

"We think the justice erred in the principle upon which he proceeded.

"... where the legislature... invests a subordinate body with the power to investigate and determine the fact whether in any special case any use is made of property for purposes of storage, dangerous on account of its liability to originate or extend a conflagration... then we are of the opinion that in such cases the reasonableness of the determination of the board or of the order prohibiting a particular use in accordance with such determination, is open to contestation by the party affected thereby, and that he is entitled, when sued for disobedience of the order, to show that it was unreasonable, unnecessary and oppressive."⁵³

⁵² *Wilson v. United States*, 263 U. S. 563, 570; *Davis v. United States*, 100 U. S. 469.

⁵³ See also *McLean v. Jephson*, 123 N. Y. 142, 25 N. E. 409; *Board of Health v. Heister*, 37 N. Y. 661. Cf. *People v. Kaye*, 212 N. Y. 407, 416; *State v. Lamòs*, 26 Maine 258; *Spencer v. People*, 68 Ill. 510; *State v. Weinger*, 64 Iowa 243; *State v. Kirby*, 120 Iowa 26; *Crane v. State*, 5 Okla. Cr. 560; *Richter v. State*, 16 Wyo. 437.

In *Wayne v. Thompson*, L. R. 15, Q. B. 342 (1885), the law in question provided that the inspector of meats had the power to determine that meat was unfit for consumption. If he made such a determination, the meat was brought before a magistrate who heard the inspector. If the magistrate was satisfied that the meat was unfit for human consumption, he ordered it destroyed and the owner of the meat was thereupon subject to imprisonment. This is a proceeding on an order to show cause as to why the defendant should not be put in jail. The lower court permitted evidence as to the condition of the meat at the time it was condemned; was satisfied that the meat was not unwholesome and gave judgment to the defendant with costs. On appeal the plaintiff-appellant argued that the Court of Petty Sessions (the trial court) was not a court of appeal to review the decision that the meat was bad; in the criminal proceeding the owner could show that the meat had not been exposed for sale or that it was not intended as food for man, but the decision that the meat was unfit for human use was final and conclusive. The Court of Queen's Bench overruled the plaintiff's argument and upheld the decision of the lower court in permitting the evidence to be introduced, and overruled the meat inspector's claim that such evidence was not admissible in a criminal proceeding.

The highest court of Massachusetts, in *Stevens v. Casey*, 228 Mass. 368, 117 N. E. 588, spoke on the problem in the following language: "... Doubtless if the landowner had not sought a review by the Superior Court of the action of the inspector in accordance with the terms of the statute, he would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the inspector."

In *People v. McCoy*, 125 Ill. 289, 17 N. E. 786, the defendant was a medical doctor and continued to practice medicine

after the state board of health had taken his license away by order. He was prosecuted by criminal action for practicing medicine without a license. In ruling that the administrative order was invalid because it was not supported by the evidence, the court declared: "The board cannot from mere caprice, or without cause, revoke a certificate fairly issued upon sufficient evidence of the applicant's qualifications."

In *State v. Rachskowski*, 86 Conn. 677, the defendant was convicted for violating a quarantine order. On the trial it was urged that there was no basis for the order since the undisputed evidence showed no grounds for reasonable belief that the defendant was infected with the contagious disease. The right to urge this defense was sustained and the conviction based upon the order was reversed and the prosecution dismissed.

In *Stone v. United States*, 113 F. 2d 70 (C. C. A. 6), the court held that it was to first determine whether or not the securities involved fell under the exemption provided for in the securities act. Upon this inquiry the court was not bound by the action of the Securities Exchange Commission. In *Bata Shoe Co. v. Perkins*, 33 F. Supp. 509, it was said: "There are two statutory methods by which alien contract laborers who have entered, and those interested in their importation, may be dealt with. One is by deportation proceedings in which the critical facts can be examined and the questions of law determined. If the party sought to be deported is not afforded a full, adequate hearing, in which the findings are supported by substantial evidence; or, if the law is mistakenly applied in such proceedings, judicial relief can be had by the writ of habeas corpus. If the importation of an alien contract laborer, not exempted by the proviso under which the Secretary of Labor may permit such entry, has been assisted or solicited by some person or corporation, proceedings may be instituted against such person or corporation to enforce the criminal penalty. In such proceedings clearly the power of the Secretary of La-

bor to modify a permit of entry could be challenged."

The text writers and commentators are not in accord that a defense is available upon the trial of an indictment for refusal to obey an administrative order.⁵⁴

The district courts and circuit courts of appeals that have considered this question are not in agreement. Before the *Grieme* case was decided, the Circuit Court of Appeals for the Eighth Circuit said that the invalidity of an order to report for induction was available as a defense to an indictment and that the court could inquire into whether or not the classification was dishonest.⁵⁵ However, when precedent from other Circuit Courts piled high, that court changed its view on this question.⁵⁶ The Circuit Court of Appeals for the Fourth Circuit has held that the invalidity of the order to report for induction is available as a defense. But the scope of review is narrowed to such an extent that the defense is devitalized and made impotent.⁵⁷ This is the same as a denial of a defense altogether. Two district courts have made similar rulings.⁵⁸

⁵⁴ "Statutory Roads to Review of Federal Administrative Orders", by Beck P. McAllister, 28 California Law Review 129, 165: "... If no form of statutory judicial review is available there is every reason to say that review should be had in the criminal court." See also article by U. S. D. Judge R. C. Bell in March 1942 American Bar Association Journal, page 164; Southern California Law Review, November 1942, page 24; Cf. 28 Virginia Law Review 626, 628; 10 George Washington Law Review 827; 28 Am. Bar Ass'n Journal 164; 30 Cal. L. R. 226; 36 Ill. L. R. 310; 30 Geo. L. J. 636; 16 So. Cal. L. Rev. 24; 20 Tex. Law Rev. 371; 8 Ohio St. U. L. J. 89; 40 Mich. L. R. 451; 8 U. Pitt. L. R. 58; 36 Ill. L. R. 352.

⁵⁵ *Johnson v. United States*, 126 F. 242, 247.

⁵⁶ Cf. *Seele v. United States*, 133 F. 2d 1015 (8th Circuit). See other cases: *United States v. Grieme*, supra (3rd Circuit); *Fletcher v. United States*, 126 F. 2d 262 (5th Circuit); *United States v. Kauten*, 133 F. 2d 703 (2nd Circuit); *Boules v. United States*, 131 F. 2d 818 (3rd Circuit); *Haberman v. United States*, 131 F. 2d 1018 (5th Circuit); *United States v. Mroz*, No. 8207, October Term 1942, April Session 1943 (7th Circuit); *Mangum v. United States*, No. 10384, October Term 1942 (5th Circuit). For a review of the cases under the 1940 Act see the Second Report of the Director, *Selective Service in Wartime*, pp. 322-327.

⁵⁷ *Barley v. United States*, 134 F. 2d 998; *Goff v. United States*, 135 F. 2d 610; *Honaker v. United States*, 135 F. 2d 613.

⁵⁸ *United States v. Di Lorenzo*, 45 F. Supp. 590.

Petitioner contends that upon a trial of an indictment alleging disobedience to an administrative order, the scope of the defense is as broad as in any other criminal case; and in determining the guilt of the accused the court is not limited to the rules that have been established in civil cases, or habeas corpus cases where administrative determinations have been reviewed in the federal courts. The trial of such an indictment is *de novo* as far as the administrative findings as to exemption as a minister of religion is concerned and the court is bound to exercise its independent judgment and be guided by the rules of criminal procedure established by the decisions, the statutes and the rules of the Court, requiring proof of guilt beyond a reasonable doubt, etc., in the trial of the case.

C

Availability of the writ of habeas corpus as a remedy does not limit the defenses available in this sort of criminal case.

Habeas corpus is not an exclusive remedy. It reaches only the vital question in a case to determine whether or not *due process of law* or some fundamental right of the accused secured by the Constitution has been violated. The remedy does not provide a review on many questions or as extensively as does review on an appeal. Many matters can be urged in defense of a criminal prosecution that cannot be urged on writ of habeas corpus. Habeas corpus is not a substitute for appeal. The defense of a criminal case is not limited to the issues that can be urged on a writ of habeas corpus. The government says that the writ is available to test the validity of the induction order only after the registrant has reported for induction and is restrained by the military or other authorities. If the writ of habeas corpus is available to obtain the release of one from the military authorities, *a fortiori*, it would be available to obtain the release of one incarcerated in a penitentiary under

a judgment of conviction for alleged violation of the Act.⁵⁹

To require a person who is declared to be exempt by statute to report for induction before he can question the validity of the order is contrary to all principle, justice and fair play. There is no reason, logic or law to support the claim of the court to arrogate the prerogative of forcing a citizen to submit to a void order and apply for habeas corpus before challenging the validity of the order. To require petitioner to report for induction would cause him to violate his covenant with the Everliving God, which would result in his everlasting destruction. (R. 69, 79) It is unfair to require one to violate his conscience as a condition precedent to asserting his rights as a citizen. If it is contrary to justice to require a "conscientious objector" to be inducted for military service, then it is doubly mischievous to compel an "ordained minister", who is exempt by statute, to report for induction.⁶⁰

Is the machinery of justice so geared and greased during times of war that it cannot be stopped or slowed up long enough to permit full inquiry as to whether or not an administrative agency is usurping its authority and violating the laws of the land and the constitutional rights of a citizen? Practical necessity of compliance with the induction order does not justify the denial of liberty.

In the passage of the Selective Training and Service Act, Congress did not provide for such a miscarriage of justice. It contemplated the trial of an indictment in the

⁵⁹ *Smith v. O'Grady*, 312 U. S. 329; *Holiday v. Johnston*, 313 U. S. 342; *Walker v. Johnston*, 312 U. S. 275; *Johnson v. Zerbst*, 304 U. S. 458; *Bowen v. Johnston*, 306 U. S. 19; *Waley v. Johnston*, 316 U. S. 101. Cf. *Ex parte Stewart*, 47 F. Supp. 410, where it was held that the writ was available to test the validity of an induction order before indictment without reporting for induction.

⁶⁰ Close scrutiny of the Act discloses that a "conscientious objector" is not exempt from induction. He is subject to induction. He is exempt by Congress from performing certain kinds of work after induction. The statute (Act) and regulations prescribed the type of work that he is required to do when inducted if the claim for conscientious objection be sustained. The statute completely exempts from induction for all training and service an ordained minister of religion.

district court. If Congress anticipated that the registrant must report for induction as a condition precedent to test the validity of the local board's order it would have said so. There would be no reason for the prosecution of the delinquent in the district court if Congress intended thus. The intent of Congress was to attain as nearly as may be the objective of the Selective Training and Service Act, to wit, national defense. Congress provided for prosecutions for violations, which implied the right to defend against the indictment.

The local board is *not above the law*. If the local board violates the law and the rights of the registrant, then the controversy should not be settled in the military machinery, but in the civil courts.

The *Grieme* rule makes the orders of the local board the supreme law of the land and makes void the fundamental rights of the citizen.

The induction of a civilian into military or other service is a grave step, fraught with serious and grave consequences and dangers. Immediately upon reporting for induction the civilian is stripped of all his civil rights and agrees to be bound by rules and regulations of strict and severe regimentation. He becomes subject to the military law instead of the ordinary common law and statutory law. If he violates a military order, he is subject to court martial. A new status is taken on. He becomes a soldier. New responsibilities are assumed. A failure to strictly meet those responsibilities may bring the death penalty.⁶¹ This is right and necessary to maintain discipline and to have an effective army.

All steps required to be taken as a condition precedent to induction into the services should be strictly pursued, otherwise the petitioner cannot be lawfully ordered to report for induction or inducted into the services.⁶² The constitutional

⁶¹ Article 64 of The Articles of War (sec. 1, Ch. II, Act of June 4, 1920, 41 Stat. 787). *A Manual for Courts-Martial, U. S. Army*, 1928, p. 218.

⁶² *Ver Mehren v. Strmyer*, 36 F. 2d 876 (C. C. A. 8).

guarantees of the citizen are defeated by compelling him to report for induction and surrender all citizenship rights, as a condition precedent to testing the validity of a local board order to report for induction. The writers of the Constitution, the fathers of the judiciary, never dreamed of such a fantastic proposition as forcing the citizen to give up his liberty as the cost for a hearing. He must not surrender the right to a speedy and public trial, guaranteed by the Sixth Amendment, as payment for failure to comply with an illegal order of the board.

In addition to the above hardships one must endure, it should be considered that the petition for writ of habeas corpus can be heard only at the place where the inductee is held in custody, or where his superior officer or the conscientious objector camp is located. This may be hundreds, if not thousands, of miles away from the scene of the controversy and at such a place where records and witnesses would be impossible to obtain.

In the case of one inducted into military service he may be immediately taken to some camp thousands of miles away and may be shipped to some foreign shore, North Africa, Italy, Australia, or some other place where the writ of habeas corpus to test induction is an illusory process. There is nothing to prevent a conscientious objector from being sent to foreign lands also beyond reach of process of federal courts. Thus the remedy offered as a substitute for the right to a defense to the indictment at the *locus in quo* becomes a mythical one.

The contention that one must, as a condition precedent to judicial review, report for induction as a conscientious objector to do work of national importance at a conscientious objectors' camp gives no support or vitality to the argument made by the Government. It is entirely voluntary as to whether the conscientious objector will comply with the rules and regulations. He can desert the camp and cannot be court-martialed or punished by the military or other.

authorities. He is not subject to military jurisdiction. The only provision for punishment is that in the event of desertion from the camp, the deserter can be reported to the United States attorney as a delinquent.⁶³ Upon his trial for such delinquency, he could urge any defense that would show that he is not legally inducted.⁶⁴ Of course, there is a measure of restraint of one in such camp that is sufficient to permit a writ of habeas corpus to test the validity of such an induction order, but the fact that he would have available the remedy of the writ of habeas corpus would not militate against his right to defend against the indictment.

Those charged with the operation of the Selective Service System, the military forces, and the Civilian Public Service camp supervisors, should be free of any controversy with reference to proper classification. It is not more convenient for those agencies to demand that one report for induction and then test the validity of the order on writ of habeas corpus. In that event such agencies are bothered and burdened with an answer of the petition for writ of habeas corpus.⁶⁵ Such controversies disrupt the operations of the military and civilian public service. It was the intent of Congress to keep these controversies out of the administration of such forces and confine them to the United States district courts. No theory of policy or practicability justifies distorting the intent of Congress, the denial of freedom and due process of law. The Selective Training and Service Act was passed as a medium to raise an army to protect such institutions. The price of raising such forces should not be the surrender of the liberties and rights of the citizen in the federal courts of the land, the primary bulwark of liberty. Neither the Constitution of the United States nor the general law of criminal procedure requires

⁶³ Reg. s. 691.17 (d) (e). Appendix p. 34a.

⁶⁴ *Ver Mehren v. Sirmper*, 36 F. 2d 876, 882.

⁶⁵ *Hearings before Committee on Military Affairs House of Representatives on H. R. 10132, infra; Selective Service in Peacetime*, pp. 294-296.

a citizen to give up his liberty, perhaps his life, before he is granted the privilege of asserting his defenses. The rule is judicial extortion! The price of a judicial hearing and the privilege of making a defense should never be purchased at such high cost.

D

Decisions holding that petition for writ of habeas corpus is the only available remedy to determine the validity of a selective service local board's order to report for induction do not control here so as to deny a defense or narrow the scope of review under an indictment charging a violation of the Selective Training and Service Act.

The correct interpretation of the act as to remedies permitted is not controlled by prior conscription acts or decisions thereunder limiting the means of review to habeas corpus proceedings because the acts are essentially different. The Selective Training and Service Act of 1940 allows broader defenses to indictments against registrants than were permitted to inductees on habeas corpus hearings under prior acts.

The courts in determining the remedies available in defense of an indictment under the Selective Training and Service Act of 1940 have relied upon precedent and decisions that were based on entirely different acts. Here the courts have fallen deep into the pit of error.

This Court should not lose sight of the obligation to interpret the particular act involved, which is fundamentally different from all previous conscription acts. The jurisdiction of the military and administrative agencies to assume disciplinary control or jurisdiction attaches against the individual at a different time.

Under former acts the violation of induction process was a military offense.

Now the present act makes it an offense punishable by

indictment in the United States district courts, if not physically inducted.

Under the former acts habeas corpus was the only remedy available, even though not specifically provided in the act. The inductee was in the army after the time specified in the notice to report for induction.

In the present act it is not specifically provided that habeas corpus is available but it is nevertheless available to one wrongfully inducted. By double force of reason the defense of invalidity of the order to report for induction can be made in the defense to an indictment and returned under the act. Habeas corpus may be a *proper* remedy but it is not the *only* remedy. It is not exclusive.

Under the Act of 1812, the Conscription Act of 1863 and the Selective Service Law of 1917 (50 U. S. C. 226, Note; 40 Stat. 76) the selectee was subject to military jurisdiction from the moment that he was ordered by his local draft board to report for induction. Actual, physical and formal induction was unnecessary, as it is necessary under the 1940 Act and Regulations.

Under the 1940 Act and Regulations one is not subject to military jurisdiction or to civilian jurisdiction under the Act until he has reported at the induction center.⁶⁶

It is plain that under all previous conscription acts the only remedy in order to determine the validity of the induction order was by way of writ of habeas corpus. Under those statutes there was no provision for a criminal trial in the district court of one lawfully registered who refused to report for induction. There is no provision for the local board to induct any registrant under the Act of 1940. The authority of the local board is confined to notifying the registrant of suspected delinquency, investigating same and

⁶⁶ Reg. s. 601.7, 601.8, 633.1 to 633.9, incl. Appendix pp. 12a, 25a-26a. The Director in his Second Report recognizes that the status of a registrant under the 1917 Act was no criterion to determine the rights of registrants in defense to an indictment under the 1940 Act. They are declared by him to be essentially different. *Selective Service in Wartime*, p. 323.

reporting delinquencies to the United States district attorney.⁶⁷

Section 157 of the Regulations under the 1917 Act provided that "From and after the day and hour thus specified each such registrant shall be in the military service of the United States." The only step necessary to invoke military jurisdiction was that when the time came for the registrant to report he was under military jurisdiction. Many cases so held.⁶⁸

The original Senate [Burke-Wadsworth] Bill contained a provision for concurrent jurisdiction over violators of the Act in the civil and the military courts. (86 Cong. Record, part 9, p. 10709) The Act was later amended to embody clear exemption from military jurisdiction by the violator who was not actually inducted. Senator Bone, introducing the amendment, said: "My amendment would substitute the United States District Court as the body to try such a young man [who violates an order to report for induction] instead of a naval or military court martial. . . ." (86 Cong. Record, p. 10985) In conferences of both houses, the Senate provision was accepted. The conference report reads: "The Senate Bill provided that persons subject to the Bill who fail to report for duty as ordered should be tried exclusively in the District Courts of the United States and not by military or naval court-martial, unless such persons had actually been inducted for the training and service prescribed in the Bill or unless they were subject to trial by court martial under laws in force prior to the enactment of the Bill. . . .

"The conference agreement contains the provision of the Senate Bill in this respect."

Before the Committee on Military Affairs, House of Representatives, Major Lewis B. Hershey testified that the

⁶⁷ Reg. s. 642.1 to 642.5, incl. Appendix pp. 27a-29a.

⁶⁸ *Franke v. Murray*, 248 F. 865 (CCA-8); *United States v. McIntyre*, 4 F. 2d 823 (CCA-9); *United States ex rel. Feld v. Bullard*, 290 F. 704 (CCA-2), certiorari denied 262 U.S. 760; Articles of War, s. 2 (a), 41 Stat. 787, 10 U.S.C. 1473, S.S.R. 1917 s. 133, 140.

military authority should not be the policeman to enforce the Act.⁶⁹

The First Report of the Director of Selective Service, 1940-41, declares that the prosecutions of alleged violators, who have not reported for induction, has not been vested with the military authorities. He states that America learned the lesson from the Civil War when draft riots resulted; that there is considerable difference in the enforcement of the 1940 Act, as the legal obligations upon the registrant are not the same as under the 1917 Act. He also reported that all delinquents under the 1940 Act are prosecuted by civil authorities through the Department of Justice, that the military authorities had no jurisdiction over a delinquent.⁷⁰ He reports that the enforcement of the Act in this manner has gained acceptance by the general public.⁷¹

From this legislative history it is plain that the 1940 Act was intended to permit the civil authorities, the people of the United States, the local draft boards and the federal district courts, to administer the Act with full authority to enforce its provisions prior to actual induction of one who refuses to obey the order to report for induction. One who challenges the legality of the local board's order may urge his defense to the indictment before the district court having jurisdiction for a determination of his rights without first submitting to military jurisdiction.

The arguments of the government, the court below and other courts that have followed it, do not consider the intent of Congress but completely ignore it. They build up factitious arguments and synthetic deductions to reach a

⁶⁹ Hearings before the Committee on Military Affairs, House of Representatives, Seventy-sixth Congress, Third Session, on H. R. 10132, pp. 125-126.

⁷⁰ *Selective Service in Peacetime* (Government Printing Office 1942), pp. 293-296. The Department of Justice is expected to enforce the criminal provisions of the Act, and not the Army or Navy. *Selective Service in Wartime*, p. 312.

⁷¹ Op. cit. p. 297. The increase in inductions has not proportionately increased the cases under the Act. *Selective Service in Wartime*, p. 311.

false conclusion, to wit, that the sole way a registrant may challenge the illegality of action by the Selective Service System under the present Act is by petition for writ of habeas corpus only after reporting for induction. It is plain that this structure is built upon a false premise, disregarding provisions of the Act of 1940. Like a house constructed upon sand, when the floodwaters of truth pour down upon it, it falls and is destroyed.

The decisions under the 1917 Act holding that the writ of habeas corpus is the only remedy are not applicable to the cases under the 1940 Act. Congress knew that defenses would be urged in the district courts upon trial under the indictment. Congress intended that the ordinary rules of criminal procedure would apply. It is clear that if so drastic a measure as that advocated by the Department of Justice and the *Grieme* decision to take away all defenses to prosecutions under the indictment was intended by Congress, it would have expressly provided in the Act itself for the denial of defenses, under an indictment and said that habeas corpus after induction was the only remedy. The failure of Congress to declare thus clearly implies its intention that prosecutions under the Act shall be governed and controlled by the procedure ordinarily applying to all criminal prosecutions so as to allow a defendant to challenge the validity of a board's order.

Section 10 of the 1940 Act provides that the decision of the local board shall be final except for appeals within the Selective Service System. This does not bar judicial review. Similar provisions are to be found in the Federal Trade Commission Act, the Securities Exchange Act, and in the Acts creating the Federal Alcohol Administration and the Federal Power Commission. The failure of statutes to provide for a review does not abridge the jurisdiction of the federal courts to review administrative action.⁷²

⁷² *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902) (postal fraud order); *Ng Fung Ho v. White*, 259 U. S. 276 (1922).

Ordinarily it is the duty of the Court to accept the intent of Congress and so construe the language of the act to give effect to that intent. The courts are not authorized to circumvent or distort the intent of Congress to reach some conclusion not supported by the spirit and words of the Act except to avoid unreasonable and unconstitutional results.⁷³

Furthermore, in construing the penal provisions of the Selective Training and Service Act, all reasonable doubts concerning its meaning must be indulged in favor of the petitioner. Justice Story says: "It would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet for penalties." *United States v. Shackford*, 5 Mason 445, 450.⁷⁴

The statute should be construed in such a way as to avoid forfeiture and penalties and not to reach the unreasonable, arbitrary and factitious conclusion of the government and the court below. It is manifest that Congress intended to permit every defense available against the board's order in the trial of an indictment charging a violation of the Selective Training and Service Act and did not intend to limit the remedy of a registrant to the petition for writ of habeas corpus for attack of validity of a local draft board action.

E

The order of the local board directing the petitioner to report for induction is a final order so as to permit judicial review of the invalidity of the local board's order.

The contention that the induction process is not complete until the petitioner reported for induction and that

(alien deportation); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316 (1903) (determination by the Land Office of the extent of a land grant). Cf. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229.

⁷³ *United States v. American Trucking Ass'ns*, 310 U. S. 534, 542; *United States v. Kirby*, 7 Wall. 482, 486, 487; *Helvering v. Hammel*, 311 U. S. 504, 510.

⁷⁴ See also *Harrison v. Vose*, 9 How. 372, 378; *Ozawa v. United States*, 260 U. S. 178, 194; *Pennington v. Coze*, 2 Cranch 33, 52.

the "order" could not be attacked until the entire administrative process is completed by reporting for induction does not apply because a fallacy. (*United States v. Kauten*, 133 F.2d 703) The "order to report" is the final process issued by the local board. No appeal is permitted from the order. "It is the end of a proceeding begun against the witness." (Justice Holmes in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 442.) The order is not an interlocutory, preliminary or procedural order of an administrative agency such as this court considered in *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375; *United States v. Ill. Cent. R. Co.*, 244 U. S. 82, and *Endicott Johnson Corporation v. Perkins*, 319 U. S. —, 63 S. Ct. 339, decided January 11, 1943. In each of those cases there yet remained the opportunity for correction of error by the administrative board on final hearing by final judgment. The local board had finished its job with respect to petitioner's classification. It had rendered its final judgment. The "order" to report had issued. Nothing further remained to be done by the administrative agency with respect to petitioner's claim, except execute the judgment entered. *Alexander v. United States*, 201 U. S. 117; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Harriman v. Interstate Comm. Com'n*, 211 U. S. 407.

The rule contended for by the government here destroys the precepts of this Court on *final judgments*. A judgment of a trial court would never be final or appealable until complied with. Such a rule requiring that litigants comply with judgments rendered against them before they could appeal or obtain relief would turn upside down the fundamental procedure of judicial review by Federal courts.

It is to be observed that this court has not yet held that final orders of other administrative agencies must be complied with before review in courts can be had. Some orders of such administrative agencies upon merits of a controversy are appealable by statute to the Circuit Court of Appeals.

All other final orders of such agencies can be attacked through the extraordinary remedies within the jurisdiction of the United States District Court. Never yet has there been a decision by this tribunal requiring one to comply with the order of an administrative agency before questioning it in the courts.

Invoking the judicial process of the United States District Court by the Selective Service System in reporting petitioner to the district attorney as a "delinquent" and the subsequent arrest and prosecution made the classification and "order to report" a *final order*, if it be held not final until petitioner reported for induction. When prosecution was started the process of the board took on such form of finality as to make the *entire proceedings* subject to judicial review. The situation is analogous to the cases where witnesses have been adjudged in contempt of court and ordered committed for refusal to answer questions or produce evidence before a commission, grand jury or examiner. In such case a full judicial review is allowed. Justice Frankfurter said: "... until the witness chooses to disobey and is committed for contempt. ... At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." *Cobbledick v. U.S.*, 309 U.S. 323, 327.

If the action of the board has reached a stage of finality so as to warrant judicial action under the act for failure to comply with the order, i. e., prosecution by indictment, it must be said to have such finality as to permit one subject thereto to question its validity in defense of the indictment.

The Government also argues that the decision of the local board and any irregularity on its part in denying petitioner his claim for exemption as an ordained minister cannot be reviewed here because the classification of the

appeal board supersedes the local board's classification and therefore the attack made by petitioner is not upon a final order. This technical rule cannot be sustained to deny a defense in a criminal action. Furthermore, the attack here is against the order to report for induction. The complaint is made against the local board. It failed to give consideration to petitioner's claim of total exemption as an ordained minister under the Act. This is the main burden of petitioner's attack, regardless of whether the classification was changed to Class IV-E. There was no change in classification or liability for induction. At all times his claim for exemption as a minister was denied. The Government admits that the local board rejected petitioner's claim for exemption as a minister and also that the appeal board rejected such claim.⁷⁵ Petitioner did not waive his claim because there was a change of classification from I-A to IV-E. Each classification made petitioner subject to induction process. The last and final classification received by petitioner was that given him by the local board on July 15, 1942, when it changed petitioner's classification from I-A to Class IV-E, one month after the IV-E classification issued by the appeal board. (R. 58) The classification of the local board, therefore, became final and was not subject to further appeal because the appeal was taken on a claim for IV-D classification. This claim was rejected by both the local and the appeal board. The argument of the Government that the classification by the appeal board is *de novo* is entirely immaterial. The question for determination is: "Did the local board and the appeal board deny petitioner's claim for exemption?" Admittedly the local board denied this claim and so did the appeal board. There was no dissent by the appeal board and the action of both boards was unanimous. Accordingly there was no appeal to the president allowed by the Regulations from IV-E classification.⁷⁶

⁷⁵ See MEMORANDUM FOR THE UNITED STATES IN OPPOSITION, p. 10.

⁷⁶ Reg. s. 627.26, 628.2, 628.7 (a); Appendix pp. 24a-25a.

Petitioner had exhausted all remedies within the Selective Service System and the order was final.

The relationship between the local and appeal board in reference to classification is very similar to that of the trial and the appellate court. A registrant cannot ordinarily present new evidence before an appeal board that was not considered by the local board. On appeal he can only set out in full any new evidence which was offered to the local board and which that board refused to include in the file.⁷⁷

Upon appeal the appeal board may either affirm or set aside the classification and render a new classification in lieu of that given by the local board. There is no *de novo* hearing. The classification of the appeal board becomes the classification of the local board. Reg. s. 603.24.

For the purposes of determining the question presented here, the change of classification is immaterial because both boards overruled petitioner's claim for exemption, and each classification made the petitioner liable for induction.

If the order to report for induction is final so as to permit an indictment to be based thereon, then there is sufficient finality to permit petitioner to make any defense against the action of the local board that might be available. The question of exemption is available irrespective of the classification or change of classification by the local board and appeal board.

The rule in reference to review of interlocutory orders by administrative agencies does not apply here.⁷⁸ The order to report was the final order. It can be attacked.

⁷⁷ Reg. ss. 603.24, 627.12. (Appendix pp. 14a, 22a) The exception to this is the case of evidence taken upon a hearing conducted by a Hearing Officer of the Department of Justice on the claim as conscientious objector, pursuant to section 5 (g) of the Selective Training and Service Act, and section 627.25 of the Regulations. (Appendix pp. 6a, 22a) In this instance evidence received by him may be added to the file on appeal.

⁷⁸ *Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n.*, 306 U.S. 56; *Rochester Telephone Corp'n v. United States*, 307 U.S. 125.

F

The rule announced and followed in the *Grieme* case transfers and surrenders the judicial power of the federal courts so as to make the courts mere administrative sentencing agents of the local boards, denying the petitioner a judicial criminal trial.

The Constitution imposes upon the judicial department of the government the solemn duty of interpreting the laws and preserving the integrity of the judicial system so as to allow a full and fair hearing to all litigants whether prince or pauper, governor or governed, bond or free, rich or poor, black or white. Regardless of how disagreeable that duty may be, in cases where its own judgment may differ from that of high functionaries of the executive branch or the legislative branch, or administrative agencies, the courts are not at liberty to surrender or waive any of the judicial duties or powers.⁷⁰

In the case of *Cohens v. Virginia*, 6 Wheat. 264 (1821), this Court, at page 404, said:

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

In *Ex parte Milligan*, 4 Wall. 2, this Court, at page 123, held that a citizen in civilian life, not subject to military

⁷⁰ *United States v. Dickson*, 15 Pet. 141, 162 (1841); *Muskrat v. United States*, 219 U. S. 346 (1911).

service, cannot be tried by a military commission as long as the courts are open to hear criminal accusations and redress grievances. It is submitted that the rule in the *Grieme* case collides head on with the principle announced in the *Milligan* case.

Nominally petitioner was tried in the United States district court. He was merely convicted there. He was not permitted to make a defense. In truth and in fact he was tried before the local board, an administrative agency, which is an arm of the Commander-in-Chief of the military forces. True he was not subject to military discipline, but he was tried and found guilty by the local board. The federal court merely performed its ministerial and administrative function of pronouncing sentence upon petitioner. The petitioner's trial was by the board. The proceedings in the district court were by ordeal. This is condemned by the voice of justice from the beginning of the judicial system of the federal courts.

This Court has held that a law authorizing an administrative agency to punish by imprisonment at hard labor an alien found to be in the United States in violation of law, in addition to a final deportation order, was unconstitutional. The Court said that it did not secure to the alien a judicial trial.⁸⁰ That decision governs this case.

The rule of the *Grieme* case also denies petitioner the right to counsel. Petitioner was tried and convicted before the local board. The Selective Service Regulations⁸¹ do not permit petitioner to have counsel before the local board at a hearing or at any other time. The *denial of counsel* before the local board, where petitioner was tried and convicted, is tantamount to the denial of counsel in the United States district court. It did little or no good to have counsel in the district court, as counsel was denied the privilege of offering any defense. Until the Department of Justice began to

⁸⁰ *Wong Wing v. United States*, 163 U. S. 228, 238 (1896).

⁸¹ S. 6522, Appendix p. 21a.

champion the rule of the *Grieme* case the propriety of judicial review as to administrative adjudication had never been questioned or doubted. It is the power of the courts to make final interpretation of the statutes and regulations, and their application. In ordinary administrative cases, the object of judicial review is to serve as a check on the administrative branch of the Government—a check against excess of power and abusive exercise of power in derogation of private right. However, in criminal cases prosecuted incidentally to the execution of administrative procedure the judicial review by the federal courts is not thus limited to the narrow scope of review allowed in civil actions brought in federal courts to check the action of an administrative board. In criminal cases of the sort here involved the scope of review must be broadened so as to apply the fundamental rules of criminal procedure. Review in such cases should be guided by the ordinary rules relating to burden of proof, presumption of innocence, sufficiency of the evidence to sustain conviction, etc. The *policy decision* in the *Grieme* case denies the courts their right, duty and burden of performing the delicate and difficult task of closely scrutinizing the evidence in criminal cases so as to compel the Government to discharge its burden and preserve the rights of the accused. It causes judges to treat their duties lightly and to wash their hands of a grave and serious responsibility, saying, "With that in this particular trial we have nothing to do. The court and the jury must accept as a fact that he was classified in Class 4-E, as a conscientious objector. And then, if you find from the facts that he failed to report—and there is no evidence to the contrary, and even he himself admits it on the witness stand, that he did not report—it would be your duty to find him guilty." R. 41.⁸²

It is perfectly proper and lawful for the Chief Executive to delegate his powers to the Director of Selective Service to raise an army. However, the courts do not have the privi-

⁸² Cf. Matthew 27: 24.

lege of delegating any of their powers. The rule advocated by the Department of Justice for application to Selective Training and Service Act violations corrupts the judiciary and lowers its functions to the level of a mere administrative agency. The courts thus become a rubber stamp for use of the draft boards. It strips the courts of all judicial functions in a field where each and every court should be most jealous against surrender of any of its powers, to wit, the protection of the *due process clause* and the liberty of the citizen when charged with grave crime. It is the duty of the courts to do justice, not to act as ministerial agencies to send men to the penitentiary. The judiciary is oblivious to public clamor, the noise of the war machines, the echo of the tramping soldiers, and the tune of martial music. The ear of justice is deaf to all such. She is blind to any move that would result in the criminal law's being unfairly administered. Must the American people sacrifice their rights to a fair judicial trial, a full judicial hearing, due process of law and access to the courts as a price for war? It is clear that the excuse for war is to preserve these heritages. The argument of the Department of Justice, created to assist in the administration of justice, not obtain convictions, presents a strange paradox in the field of criminal procedure. If the *Grieme* case is the law, then anything may be made the law of the land that the administrative body under proper regulations may see fit to order. It gives administrative agencies unbridled authority to pass judgment upon, fetter an individual citizen and turn due process of law into mere nonsense. Such a strange construction renders constitutional provisions and criminal procedure of the highest importance inoperative and void. It thus establishes the union of all power in the executive and administrative branch. There would be no general, permanent, criminal law or procedure for the courts to administer or for men to live under. Daniel Webster told this Court, in an important case: "The administration of justice would be an empty form, an idle

ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."⁸³ His words apply here now.

The rule of the *Grieme* case is therefore a denial of a judicial trial and allows the administrative agency to usurp and deny the judicial power of the courts in criminal cases.

G

The duty of the federal district court on trial of the indictment required it to hear evidence *de novo* and decide the case without regard to, and independent of, the administrative determination by the local board and to apply the fundamental rules of criminal procedure in determining whether petitioner violated the Selective Training and Service Act.

The rule of limited inquiry applicable in habeas corpus cases and in administrative review in civil actions does not apply to prosecutions by indictment charging one with a violation of an administrative order. There are certain fundamental rules that must be followed in the trial of any criminal case in a federal court. They are presumption of innocence, confrontation of witnesses, burden of proof on the part of the government to establish guilt of the defendant beyond a reasonable doubt, the plea of "not guilty", the defense of alibi, the various defenses of confession and avoidance.

Upon a trial of one charged with a violation of the Selective Training and Service Act, the burden is upon the government to prove beyond a reasonable doubt that the defendant refused to perform some duty imposed upon him under the Act. The introduction of the registration card, the Selective Service questionnaire, and the order to report for induction would constitute a *prima facie* case. The defendant would have the right to rebut this *prima facie*

⁸³ *Dartmouth College v. Woodward*, supra. The rule against usurpation of judicial power by executive bodies has been condemned in England in *Chester v. Bateson*, 1 Kings Bench 829 (1920).

evidence by showing from the questionnaire or from an independent source that the local board did not have jurisdiction to induct him because he was exempt under the Act. If this exempt status is established and no evidence appears to contradict the same, then, as a matter of law, the defendant would be entitled to an instructed verdict of acquittal. The duty of inquiry by the court does not stop at receiving in evidence the induction order. The court is required to go further and ascertain beyond a reasonable doubt that a duty devolved upon defendant to comply with the directions of the local board under the Act. The burden of proof remains with the government throughout the trial to establish the guilt of the defendant beyond a reasonable doubt. If he has justification for not complying with the order he should be found not guilty. The rule in the *Grieme* case relieves the government of its burden of proof and throws the burden onto the defendant to establish innocence, contrary to statutes and decisions of this Court.⁸⁴ The Government must prove every essential element of the offense described in the statute.⁸⁵

If the rule applied in civil cases to review administrative action is held to govern the trial of an indictment, then the burden of proof and the rule of reasonable doubt vanishes from the case. It is not limited to whether there was substantial evidence to support the local board's findings, nor is it limited to whether there was a fair and full hearing. If there is reasonable doubt as to whether or not the registrant is exempt, it is the duty of the jury to acquit, and if the evidence on the question of exemption evenly preponderates, it is the duty of the trial court to instruct a verdict for defendant.⁸⁶

The inquiry, in a case under the Act where the individual is exempt as an ordained minister, is not, "Did the board

⁸⁴ *Davis v. United States*, 160 U. S. 469.

⁸⁵ *Konda v. United States*, 166 F. 91 (C.C.A. 7); *Smith v. United States*, 208 F. 131 (C.C.A. 8).

⁸⁶ *Edwards v. United States*, 7 F. 2d 357 (C.C.A. 8).

hear or rule contrary to the law?" but, "Is the petitioner a minister?"

It is thus apparent that the rule applicable in judicial reviews of administrative orders in civil cases and the rule applicable in habeas corpus hearings are incompatible with the fundamental prevailing rules of proof and sufficiency of the evidence in criminal cases.

H

It is the duty of the trial court to make a *de novo* inquiry and an independent determination as to the jurisdiction of the local board and petitioner's claim for exemption from induction process under the Act and Regulations.

Regardless of the extent of judicial review of the order to report for induction this Court will allow in defense of an indictment returned under the Act, it is the duty of the Court to make an independent *de novo* inquiry as to the jurisdiction of the local board. Whether the ordinary procedure in criminal cases will be applied, or the rule with reference to a review of administrative action in civil cases will be applied, is immaterial. The independent inquiry must be made as to jurisdiction.

On the issue of statutory exemption from induction the courts are not bound by the determination of administrative boards. This was firmly established in a case arising under the Militia Act of May 8, 1792. That was *Wise v. Withers*, 3 Cranch 331 (1806). Chief Justice Marshall wrote the opinion. Wise claimed exemption from service because he was a justice of the peace of the District of Columbia. The Act of Congress provided exemption from military duty of "the officers, judicial and executive, of the Government of the United States". The court-martial imposed a penalty and military fine against Wise and issued an order to the Collector of Military Fines to enforce the judgment. The Collector levied upon the property of Wise, who prosecuted an action in trespass on the case against the Collector. Chief Justice

Marshall (p. 336) said: "The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty.

"It follows, from this opinion, that a court marshal has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officers are all trespassers.

"The judgment is reversed and the cause remanded for further proceedings."

It should be kept in mind that the exemption here is a statutory exemption. The Court is not here concerned with administrative or discretionary deferments, but must consider an exemption that is a part of the Act itself. None of the cases relied upon by the Government under the 1917 Act involved statutory exemptions. Petitioner is within the legislative exemption or that class "whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them".⁸⁷ Petitioner is of that class of persons exempt by the Act of Congress; so the local board had no jurisdiction to induct him. Petitioner's only duty as a minister was to register under the Act.⁸⁸ The I-A and IV-E classifications are *ultra vires* and whether one or the other was given does not limit judicial review. The question to be determined is whether petitioner is exempt; that is to say, Does the local board have jurisdiction? If exempt and the board does not have jurisdiction, it must be concluded, as a matter of law, that the board acted arbitrarily and capriciously. When his "ministry" was established, the board had no jurisdiction

⁸⁷ Testimony of The Provost Marshal General before Committee on Military Affairs, *infra*, footnote 98, p. 67.

⁸⁸ Act s. 5 (d). Appendix p. 4a.

over the petitioner, except to require registration. The refusal to accept the assignment to do work of national importance did not constitute a violation of the Selective Training and Service Act. The statutory exemption of a minister is conclusive upon the local board. The board did not have authority to overrule or deny the statutory exemption when established by the evidence. The local board's authority, in reference to determination of this exemption, is not governed by rules relating to the determination of marriage, dependency, occupational employment, military training, physical, mental or moral condition, attendance at institutions of learning, conscientious objection to war, etc. These determinations are within the discretionary or administrative power of the president to decide, except as to conscientious objectors. The statutory provision as to conscientious objectors pertains only to the process of induction and the nature of work to be assigned and does not involve absolute exemption from service. One who is shown to be a *minister* at the time of his classification is ordinarily exempt. The exemption does not depend on the act of the local board. The local board has no discretion as to ministers of religion. This also governs the local boards in classifying officials of the state and federal governments, mentioned in Section 5 (c) of the Act.⁸⁹ If the *Grieme* rule were sustained then the vice-president of the United States or any justice of this Court could be ordered to report for induction in spite of their statutory deferment. If they desired to sustain their claim by refusing to submit to an illegal induction order, each would be denied the right to prove his exempt status as an official in defense of the indictment. This is manifestly injustice. By similar analogy one who is above age of liability for service could be similarly treated and denied the right to show his true age in defense to an indictment for refusal to obey an illegal induction order.

⁸⁹ See Appendix p. 4a.

What is sought here is not a review of the evidence, whether there is sufficiency of the evidence to support the classification, or an attempt to have the Court substitute its classification for that of the local board. The purpose is to have the Court declare, as a matter of law, that the local draft board did not have jurisdiction, because the exempt status of petitioner was established by the undisputed evidence. This inquiry is not limited to whether or not the board acted arbitrarily and capriciously, denied a full and fair hearing or showed prejudice. The order of the board being void, it is void everywhere and is subject to attack, both directly and collaterally, in every sort of judicial proceeding.

In *Chin Yow v. United States*, 208 U. S. 8, a Chinese deportation case, in directing the writ of habeas corpus to issue, Mr. Justice Holmes (p. 13) said: "The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal."

This Court held that the district courts had the right and duty to try *de novo* a jurisdictional fact or a constitutional issue upon a judicial review of an administrative finding,⁹⁰ and in so determining, apply the ordinary rules of civil procedure.⁹¹

Reviewing a determination by the Interstate Commerce Commission that an electric railway was a carrier subject to the Railway Labor Act, not reviewable by the statutory

⁹⁰ *Crowell v. Brason*, 285 U. S. 22. Cf. *Davis v. Department of Labor & Industries*, No. 86, October Term 1942, 63 S. Ct. 225. The rule of the *Davis* case does not apply here because the local board has not the same power to make fact findings, etc., as did the board under the Longshoremen's Act. Here there is no statutory presumption of jurisdiction. Furthermore here there is substantial evidence to the contrary of jurisdiction and there is presented a case of apparent error. Moreover, in that case there was involved the finding of a state administrative agency that was protected by the full faith and credit clause, Constitution, Article 4, par. 1, which is not involved here.

⁹¹ *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); *St. Joseph Stock Yards Co. v. United States*, 208 U. S. 38, 40:54 (1936).

method prescribed for orders of that Commission, this Court held that the determination was reviewable in a collateral action brought in equity by the railway to enjoin the United States Attorney from prosecuting the railway for a violation of the Labor Act.⁹²

Before granting relief asked for under the Securities Act where exempt securities are involved, the courts have uniformly held that it first must be determined by the court on an independent *de novo* review whether or not the particular securities are exempt before granting the relief asked for. The question was considered on application for subpoena in *Securities and Exchange Comm'n v. Tung Corp'n of America*, 32 F. Supp. 371.⁹³

When petitioner urged statutory exemption from the operative provisions of an administrative act and questioned the jurisdiction of the local board, it was the duty of the court to make an independent determination of these questions *de novo* to determine the validity of an administrative order in defense to the indictment. The local board did not have jurisdiction to order petitioner to report for induction.

I

The judicial review of rulings on exempt classifications and determinations discretionary by the local board, within the power of the Selective Service System, is as broad as the scope of judicial review permitted as to determinations by other administrative boards.⁹⁴

No definite and settled rule for directing the inquiry on judicial review of the action of local boards under the draft

⁹² *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 183; *Utah Fuel Co. v. Bituminous Coal Comm.*, *supra*.

⁹³ See *Silver Co. v. Federal Trade Comm.*, 292 F. 752, 753.

⁹⁴ In the event the court holds that in defense to an indictment the rules of a criminal procedure will not permit a broader inquiry of administrative determination than allowed in civil actions this, and the previous subpoint, should be seriously considered.

acts of 1917 and 1940 has been established by the courts. There is a diversity of opinion as to the scope of review. Some decisions hold that the review is limited to whether or not full and fair hearing was allowed. Others hold that a review is permitted if the classification was arbitrary and capricious. Still others hold that there can be a review if the jurisdiction of the board is transcended. See the conflicting cases.⁹⁵

It is submitted that the inquiry in cases involving judicial review under the Selective Training and Service Act should not be limited to a more reduced scope than is permitted by this Court in review of decisions by other administrative boards in civil actions. The correct rule to be applied to the review by courts of all administrative boards in civil actions has been declared by this Court to be: (1) Did the board depart from applicable rules of procedural law? (2) Did the board depart from substantive rules of law? (3) Do the findings of the board have a basis in substantive evidence or are they contrary to the undisputed evidence? (4) Were the findings of the board arbi-

⁹⁵ *United States v. Grieme*, 128 F. 2d 811; *Fletcher v. United States*, 129 F. 2d 262; *United States v. Di Lorenzo*, 45 F. Supp. 590; *United States v. Kauten*, 133 F. 2d 703; *United States v. Mroz*, No. 8207, October Term 1942, April Session (7th Circuit); *Bowles v. United States*, 131 F. 2d 818; *Seele v. United States*, 133 F. 2d 1015; *Honaker v. United States*, 135 F. 2d 613; *Goff v. United States*, 135 F. 2d 610; *Rase v. United States*, 129 F. 2d 204; *Chicinski v. United States*, 129 F. 2d 461; *Buttecali v. United States*, 130 F. 2d 172; *Benesch v. United States*, 132 F. 2d 430; *Arbitman v. Woodsde*, 258 F. 441; *Ex parte Hutflis*, 245 F. 798; *Ex parte Stewart*, 47 F. Supp. 410; *United States v. Rauch*, 253 F. 814; *Franke v. Murray*, 248 F. 865; *United States v. Heyburn*, 245 F. 360; *Angelus v. Sullivan*, 246 F. 54; *Ex parte Beales*, 252 F. 177; *United States v. Commanding Officer*, 252 F. 314; *United States v. Kinkead*, 248 F. 141, affirmed 250 F. 692; *Ex parte Platt*, 253 F. 413; *Ex parte McDonald*, 253 F. 90; *Ex parte Cohen*, 254 F. 711; *Ex parte Thieret*, 268 F. 472; *United States ex rel. Filomio v. Powell*, 38 F. Supp. 183; *Application of Greenberg*, 39 F. Supp. 13; *United States ex rel. Broker v. Baird*, 39 F. Supp. 392; *United States ex rel. Ursitti v. Baird*, 39 F. Supp. 872; *United States ex rel. Errichetti v. Baird*, 39 F. Supp. 388; *United States ex rel. Pasciuto v. Baird*, 39 F. Supp. 411; *Micheli v. Paulin*, 45 F. Supp. 687; *United States v. Embray*, 46 F. Supp. 918; *In re Rogers*, 47 F. Supp. 265; *Ex parte Robert*, 49 F. Supp. 131; *United States v. Smith*, 48 F. Supp. 842.

trary and capricious?"

In view of the confusion prevailing among the various courts as to the rule to be applied in "draft board" cases it is necessary that this Court now definitely and clearly declare the scope of review of findings and rulings of such local and appeal boards of the Selective Service System.

TWO

This Court should hold that the indictment should have been dismissed upon the petitioner's motion for dismissal at close of the government's case or *sua sponte* at the close of the evidence because the undisputed evidence showed that petitioner was a minister of religion completely exempt from induction for service of any kind under the Act and the board had no jurisdiction; therefore the order of the local board is void and the government wholly failed to prove a violation of the Selective Training and Service Act."

A

Modern history of the exemption of ministers of religion under the conscription acts.

When the 1917 Act was drafted, Congress intended to cure certain deficiencies which were apparent in the earlier

⁹⁶ *Morgan v. United States*, 298 U. S. 468, 304 U. S. 1, 304 U. S. 23, 307 U. S. 183, 313 U. S. 400; *St. Joseph Stock Yards Co. v. United States*, 28 U. S. 38; *Rochester Telephone Company v. United States*, 307 U. S. 125; *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4; *United States v. Maher*, 307 U. S. 148; *Mitchell v. United States*, 313 U. S. 80; 93-94. Cf. *Shields v. Idaho Central Ry.*, 305 U. S. 177; *Railroad Commission v. Roican & Nichols Oil Co.*, 310 U. S. 573.

⁹⁷ This point supports assignment of error number 2. R. 88-90. It is submitted that the assignment of error is sufficient in spite of the failure of counsel to renew the motion at the close of the evidence. It would result in great injustice to petitioner to refuse to consider the point here [continued on page 67]

conscription acts. There were inserted not only provisions for executive, discretionary deferments but also certain statutory exemptions. The Provost Marshal General (General Crowder) testified before the Committee on Military Affairs of the House of Representatives as follows:⁹⁸ "In the Act that is before you we have two classes of exemptions—legislative exemptions and executive exemptions. There are included in the legislative exemptions those classes whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them. There are other classes which are classified as executive exemptions, where a question of fact has to be determined. In the legislation of 1863 the judgment of the Board of Enrollment provided for in that legislation was made conclusive upon the authorities, notwithstanding which, however, the Courts undertook to inquire into the decision of the Enrolling Board in granting or refusing exemptions. This Bill makes the judgment of such agencies as the President may constitute upon the questions of fact so that the Courts would not be able to inquire into the findings of fact."

When first introduced in the House of Representatives and Senate, H. R. 10132, the Burke-Wadsworth Bill, Section 7 (c) placed regular or duly ordained ministers of religion in the regular discharge of their ministerial duties in that class of occupations which were described as executive exemptions or exemptions discretionary with the President. A hearing was had before the House Committee on

[continued from page 66]

presented because there is no evidence of guilt and the indictment is void because of want of jurisdiction of the local board to indict petitioner. *Wiborg v. United States*, 163 U. S. 632, 659; *Weems v. United States*, 217 U. S. 349, 362; *Mahler v. Eby*, 264 U. S. 32, 45; *Keasler v. Stricker*, 307 U. S. 22, 34. Moreover this court can *sua sponte* consider the question of no evidence to support the verdict and reverse the judgment. *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16.

⁹⁸ Cong. Hearings, 65th Congress, 1st Session, pp. 94, 95.

Military Affairs, at which time certain changes and amendments were considered.⁹⁹ When finally enacted as Selective Training and Service Act of 1940, Section 5 (d) provided for complete exemption for regular or duly ordained ministers of religion, which is *the only complete exemption* contained in the Act.¹⁰⁰

The Director of Selective Service in his First Report, recognized the justification for exemption of ministers because they had made a material contribution to the morale of the nation in the disturbed times of emergency and war. Concerning Section 5. (d) he says: "It is noteworthy that the language used in this section was not merely deferment, but exemption from training and service, although it was specifically added 'not from registration'."¹⁰¹

The Director of Selective Service has rendered many opinions for the guidance of local boards so as to protect the rights of dissentient groups, unusual groups, and avoid unnecessary misunderstandings and controversies between local boards and registrants who are entitled to exemption under Section 5 (d) of the Act. The Director's Notes to

⁹⁹ See *Hearings Before the Committee on Military Affairs*, House of Representatives, Seventy-sixth Congress, Third Session, on H. R. 10132 ("Selective Training and Service Act of 1940"), July 30, 1940—Statement of the Rt. Rev. Msgr. Michael J. Ready, General Secretary of the National Catholic Welfare Conference, Washington, D. C., pp. 299-305. Congressman Martin J. Kennedy suggested a modification for total exemption of ordained clergymen, seminarians and Brothers; *op. cit.* pp. 628-630. See Appendix pp. 47a-51a.

¹⁰⁰ "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act." Cf. Section 5 (c) of the Act relating to the vice-president, the governors of the various states, members of the legislative bodies and judges of the courts of record, providing for the deferment of those holding such offices so long as they remain in office. Appendix p. 4a.

¹⁰¹ *Selective Service in Peacetime*, pp. 160-170. Once it is determined that the registrant is a minister of religion there was no question as to his exempt status *ipso facto*. *Selective Service in Wartime*, p. 230.

Part 622 of the Selective Service Regulations disclose a few of these opinions.¹⁰²

The liberality of the Selective Service System to insure complete exemption for ministers of religious organizations is demonstrated in the interpretation and application of the regulations to "Lay Brothers" of the Catholic Church. These men are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy, but do menial work in the religious institutions of the Hierarchy. They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain to the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits".¹⁰³

Opinion No. 2, National Headquarters, Selective Service System, subject: "Classification—Exemption of Catholic Lay Brothers on Account of Being Regular Ministers of Religion"¹⁰⁴ declares that these men, numbering countless thousands in the United States, shall be completely exempt and shall be classified as regular ministers of religion in Class IV-D.

These opinions of the Director demonstrate the desire on the part of the Selective Service System to broaden the

¹⁰² Note 21 [MSD I-146] relates to commissioned officers of the Salvation Army and those receiving training in the theological schools of the Salvation Army; note 23 [NHO 16] relates to Readers of Church of Christ, Scientist. Note 24 [NHO 14] relates to Jehovah's witnesses (see Appendix p. 35a) This note is substantially the same as Opinion No. 14, National Headquarters, Appendix p. 36a. Note 25 [NHO 19] relates to Cantors of Jewish Congregations; note 26 [NHO 20] relates to the commissioned officers of the Volunteers of America; note 27 [NHO 18, 18-A] relates to the Christian day-school teachers of the Evangelical Lutheran Synod of Missouri, Ohio, and other States; note 28 [NHO 23] relates to the High Priests in the Melchizedek Priesthood of the Church of Jesus Christ of Latter Day Saints (Mormons).

¹⁰³ *The Catholic Encyclopedia* (1907, Robert Appleton & Co., N. Y.), Vol. 9, p. 93. See also letter of Congressman Martin J. Kennedy to Military Affairs Committee, House of Representatives, *supra*, footnote 102 and Appendix p. 47a.

¹⁰⁴ Set out in full at page 43a, Appendix. See also Note 22 of Part 622, Selective Service Regulations, Appendix p. 34a.

view of the local boards and liberalize the attitude toward total exemption of ministers as far as possible so as to give full effect to the intent of Congress in providing for the exemption.

These opinions constitute *interpretative regulations* and the Court should pay great deference to these authoritative, official interpretations of the Regulations, Section 622.44, promulgated pursuant to Section 5 (d) of the Act, as long as they do not abridge the rights of the people or transgress the Constitution.¹⁰⁵

B

Jehovah's witnesses are recognized as a religious organization under the Selective Training and Service Act and each one whose full time is devoted to preaching the gospel, under the direction of the governing body of the organization, is exempt from all training and service under the Act because a duly ordained minister of religion.

On June 12, 1941, the Director of Selective Service promulgated Opinion No. 14¹⁰⁶ defining the ministerial status of Jehovah's witnesses under Section 5 (d) of the Selective Training and Service Act, and Paragraph 360, Vol. III of the Selective Service Regulations.¹⁰⁷ The Watchtower Bible and Tract Society, Inc., and Jehovah's witnesses are declared to be a recognized religious organization.¹⁰⁸ Jehovah's witnesses, according to the time devoted to preaching, the dedication of their lives, the attitude toward them of other of Jehovah's witnesses and the record kept of them, places them in a position similar to that occupied by other regular or duly ordained ministers of recognized religious organizations.¹⁰⁹ Members of the headquarters staff of the Watch-

¹⁰⁵ *Brewster v. Gage*, 280 U. S. 327, 336; *Faucus Machine Co. v. United States*, 282 U. S. 375.

¹⁰⁶ See Appendix p. 36a.

¹⁰⁷ Section 622.44 of the Regulations, as amended. Appendix p. 17a.

¹⁰⁸ Opinion No. 14, par. 1. Appendix pp. 37a, 41a.

¹⁰⁹ Opinion No. 14, par. 2. Appendix pp. 37a, 41a.

tower Bible and Tract Society, Inc., are recognized to be within the purview of Section 5 (d) of the Act.¹¹⁰ The full-time ministers known as "pioneers" come within the purview of Section 5 (d) of the Act and are regarded as having a standing similar to other ministers in recognized religious organizations provided that the names of such persons appear on the certified official list transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.¹¹¹ The status of Jehovah's witnesses whose names do not appear on the certified official list and part-time ministers are also defined in the Opinion.¹¹²

Opinion No. 14 of National Headquarters was amended on November 2, 1942. The amendment did not change the policy of Selective Service System regarding the classification of Jehovah's witnesses. It clarified the status of those persons in full-time ministerial work whose names did not appear on the certified official list. Paragraph 3 provides: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion."¹¹³

This Court has judicially declared Jehovah's witnesses to be a recognized religious organization and entitled to receive and claim the full protection of "freedom of religion" allowed under the First and Fourteenth Amendments to the United States Constitution.¹¹⁴ Many other courts have

¹¹⁰ Opinion No. 14, par. 3. Appendix pp. 37a, 41a.

¹¹¹ Opinion No. 14, par. 4. Appendix pp. 38a, 41a-42a. Note that Opinion No. 14, as amended (Appendix pp. 41a-42a) omits this provision of having name on official list and that paragraph 4 is incorporated with paragraph 3.

¹¹² Opinion No. 14, par. 5. Appendix pp. 39a, 42a. See also Note 24, Part 622, Appendix p. 35a and Section 622.44 of the Regulations, Appendix p. 17a.

¹¹³ Appendix pp. 39a, 42a.

¹¹⁴ *Murdock v. Pennsylvania*, 319 U. S. —, 63 S. Ct. 870; *Jones v. Opelika*, 63 S. Ct. 890; *Largent v. Texas*, 318 U. S. 418, 63 S. Ct. 667; *Jamison v. Texas*, 318 U. S. 413, 63 S. Ct. 669; *Martin v. Struthers*, 63 S. Ct. 862; *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296.

also declared Jehovah's witnesses to be a recognized religious organization.¹¹⁵

The question of whether or not one who is engaged only in *part-time* service is entitled to classification as a minister is not involved here, and it is not necessary for this Court to consider that question.¹¹⁶ The petitioner is a full-time "pioneer" minister of Jehovah's witnesses and the Watchtower Bible and Tract Society.

Dissentient groups and organizations have sprung up during the history of the nation and at the present time there are 256 religious bodies with 199,302 organizations, in addition to Jehovah's witnesses, in the United States.¹¹⁷

The reason for the exemption of "ordained ministers" and "regular ministers" of religion from service under the act in question takes root in the general custom and policy of the government toward general exemption of "works of piety", which exemption is older than this government itself.

The national and state governments have assumed a very liberal attitude toward exemptions of charitable, religious and Christian work from the ordinary burdens of government imposed on all of the people. The purpose of the exemptions is to encourage the growth of such beneficent institutions. The reason for the exemption is that benefits and advantages flow to the government from the free and unhampered exercise of such activities on the "home front" among the civilian population. The moral influence exerted by these activities upon the people contribute greatly to the welfare and stability of the nation. Such activity maintains

¹¹⁵ See Petitioner's Brief in *Murdock v. Pennsylvania* (City of Jeannette), Nos. 480-487, October Term 1942, United States Supreme Court. Cf. *Borchert et al. v. Ranger et al.*, 42 F. Supp. 577, where the district judge said: "I hold their faith constitutes a religion under our Constitution and . . . a legitimate exercise of such religion."

¹¹⁶ There is authority holding that part-time ministers are entitled to exemption under the conscription acts as ministers of religion: *Ex parte Cain*, 39 Ala. 440; *Kipps v. Lane*, 86 LJ KB 735; *Hauckes v. Morey*, 86 LJ KB 1530; *Offord v. Hiscock*, 86 LJ KB 941.

¹¹⁷ *The World Almanac*, 1943, New York World-Telegram, p. 229.

the morale of the people in times of war and contributes against the tendency to slide into a morass of barbarism and indolence. The exempted activities bear burdens that would otherwise fall upon the government and general public in the establishment of welfare institutions and kindred agencies, requiring additional taxes and man power. The duties enjoined upon the people through Christian preaching imposes upon the people of good-will an obligation for their good. This contribution to the welfare and morale of the nation is beyond the power or reach of a government to attain. The activities "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure".

—*Trustees of First M. E. Church South v. City of Atlanta*, 76 Ga. 181, 192; *M. E. Church South v. Hinton*, 92 Tenn 188, 190, 21 S.W. 321, 322; *People v. Barber*, 42 Hun (N.Y.) 27; *Comm'th v. Y. M. C. A.*, 116 Ky. 711; 76 S. W. 522.

All of these religious organizations, whether popularly "recognized" or "dissentient groups", are entitled to the exemptions provided by taxation statutes for religious organizations. These exemptions are allowed on the same theory that Selective Service exemption from conscription is provided on account of the fact that, by their service, they contribute greatly to the safety of the nation and the advancement of civilization.¹¹⁸

Jehovah's witnesses are recognized as ordained ministers of religion. The Selective Service System, by Opinion No. 14, so recognizes them. In deciding whether one is exempt as a minister this Court cannot apply the yardstick of orthodox clergy. (*Murdock v. Pennsylvania*, supra) In

¹¹⁸ Zollman, *American Church Law*, pp. 325, 329. Cf. Selective Service Occupational Bulletin No. 11, June 22, 1942, CCH War Law Service 18,884: "In giving deferment to regular or duly ordained ministers of religion and to students studying for the ministry in recognized theological schools, Congress has recognized the necessity of religious guidance and education as vital to the welfare of the nation. . . . Upon information received from reliable sources, it appears that there is generally a shortage of persons trained, qualified, or skilled as regular or duly ordained ministers of religion."

considering at bar whether one is an ordained minister of religion, no member of this Court can substitute his *private* opinion as to what constitutes an ordained minister. The Court cannot substitute the methods employed by any particular recognized religious sect as a guide for determining whether Jehovah's witnesses are ordained ministers.

A person who is ordained in conformity to the customs of any organized Christian denomination is a duly ordained minister.¹¹⁹ "Minister" or "minister of the gospel" is a comprehensive term, and of uncertain significance. Ministers are spoken of as public teachers of piety, religion and morality.¹²⁰ They are sometimes called "ministers of the gospel" and sometimes "ordained ministers of the gospel", a term less comprehensive in its significance.¹²¹

A statute pertaining to authority to perform marriages by clergymen includes ministers of every denomination and faith.¹²²

"Ministers" as used in a tax exemption statute includes a person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church though he had no authority to administer the sacrament of the communion.¹²³

"Minister of religion" as used in Act providing that every minister of religion, authorized to preach according to the rules of his church and regularly employed in the discharge of his ministerial duties, shall be exempt from military service, etc., includes a minister who belonged to a religious sect who performed ministerial labor gratuitously, and who resorted to secular employment as a means of subsisting himself and his family. "If regularly employed as a minister, the fact that in the interval between his appoint-

¹¹⁹ *Town of Londonderry v. Town of Chester*, 2 N. H. 208.

¹²⁰ New Hampshire Constitution, Art. 6.

¹²¹ *Kidder v. French*, N. H.; Smith, 155, 156.

¹²² *Haggin v. Haggin*, 53 N. W. 209, 211; 35 Neb. 375.

¹²³ *Baldwin v. McClinch*, 1 Me. (1 Greene) 102, 107.

ments he pursued some other vocation, which did not according to the rules of his church disqualify him for the sacred function of the ministry, cannot take his exemption from him.

"Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously; . . . The language of the Act is 'regularly employed'. The word 'regularly' means, according to rule—in uniform order—methodically. It is not the synonym of continuously. Mr. Cain was employed in the discharge of his ministerial duties regularly—according to rule—and was, therefore, exempt from military service, under both the letter and the spirit of the Act of Congress." *Ex parte Cain*, 39 Ala. 440, 441.

"The term 'ordained minister' in Ohio R. S. 6386 authorizing the licensing, to solemnize marriages, of any ordained minister of any religious sect or society, has no regard to any particular form of administering the rite or any special form of ceremony. The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches; consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.' It has been the practice of

this court, therefore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the court that they have been duly appointed or recognized in the manner required by the regulations of their respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies." *In re Reinhart*, 9 Ohio Dec. 441, 445. [Italics added]

The word "ordain" (*ordained*) means "to establish by appointment", "to appoint or establish."¹²⁴ *The Encyclopedia Americana* (1942 Ed., Vol. 20, p. 770) defines ordination as "The ceremony by which priests, deacons, subdeacons, candidates for the minor orders and ministers of any denomination are admitted to their specific office in the church."¹²⁵

*The Cyclopedia of Biblical, Theological and Ecclesiastical Literature*¹²⁶ defines ordination as "the ceremony by which an individual is set apart to an order or office of the Christian ministry. . . . In a broader, and in fact its only important sense, . . . the appointment or designation of a person to a ministerial office, whether with or without attendant ceremonies. The term ordination is derived directly from the Latin *ordinatio*, signifying, with reference to things or affairs, a setting in order, an establishment, an edict, and with reference to men, an appointment to office. . . . A scriptural investigation of this subject can hardly fail to impress any ingenuous mind with the great signifi-

¹²⁴ Webster's *New International Dictionary*; Funk & Wagnalls *Practical Standard Dictionary*.

¹²⁵ See also *The Encyclopaedia Britannica* (11th Ed., Vol. 28, p. 527 et seq.).

¹²⁶ Vol. VII, p. 411 (McClintock and Strong, 1877, Harper & Brothers, New York).

cance of the fact that neither the Lord Jesus Christ nor any of his disciples gave specific commands or declaration in reference to ordination."

The system of ordination, according to the doctrine of apostolic succession, was practiced by the Roman Catholic Hierarchy from about the tenth century. It was fully restated by the *Council of Trent* as well as in the formularies of the Roman pontifical, the characteristics of which are: (1) that clerical orders constitute a sacrament; (2) that seven clerical orders (exclusive of seven grades of bishops, of which the pope is supreme) are those of priest, deacon, subdeacon, acolyth, exorcist, reader, and porter; (3) that bishops only are competent to confer ordination; (4) that the effect of ordination is to impress on the recipient an indelible mark; (5) that the priest has authority to offer sacrifice for living and dead. In passing, it must be noticed that the Roman Catholic Hierarchy ordains its ministers several times. An individual is ordained when he becomes a priest and each time he is elevated to a higher office, such as bishop, archbishop and cardinal.¹²⁷

The above stated theory of ordination had universal prevalence throughout "Christendom" from the sixth to the sixteenth century. A prominent factor of the Reformation was a violent reaction against the dogmas and abuses of the Roman Catholic system of ordination. Without exception Protestants rejected the "five sacraments" of the Roman Catholic Church as fictitious. Almost all such churches forsook those ordination ceremonies during the Reformation and fell back on the scriptural precedent as their sole guide for modes of appointing and ordaining ministers.¹²⁸

¹²⁷ Op. cit.; see *Encyclopedia Americana*, 1942 Ed., Vol. 2, p. 70; *The Catholic Encyclopedia* (1911, Robert Appleton Company, New York) Vol. 11, p. 279 et seq.

¹²⁸ McClintock and Strong, *Cyclopedia of Biblical, Theological and Ecclesiastical Literature*, Vol. VII, p. 417: "A partial exception has to be stated in reference to the Church of England, which retained a portion of the Roman ritual of ordination." The Director of Selective Service does not consider that ordination direct from God is sufficient to base decisive action. *Selective Service in Wartime*, p. 240.

Among the independents and Baptists the power of ordination is considered to adhere to any given congregation of believers. The qualifications of a candidate are first ascertained and he is approved by a church, called and accepted. The congregation proceeds to confer ordination upon him by prayer.¹²⁹

With the exception of the Roman Catholic Church and the Church of England, the term "ordained minister" means an *appointed minister* and is not confined to any particular kind of ceremony or formalism. Many groups, such as the Society of Friends, Disciples of Christ, Plymouth Brethren and *Jehovah's witnesses* do not recognize any human right of ordination. They recognize the ordination as coming only from Almighty God Jehovah. This may be recognized and certified by men. Man-made institutions and legal corporations that act as governing bodies of such may *declare one to be* duly ordained, and issue credentials of authority or ordination. The *ordination* proceeds only from Jehovah God and His Son, Christ Jesus.

Compare the history of the method of ordination in the following churches: Baptist, Congregationalist, Methodist, Disciples of Christ, Society of Friends (Quakers), Lutheran, Christian, Presbyterian.¹³⁰

The arrangement for recognition of Jehovah's witnesses as ordained ministers under the Selective Training and Service Act of 1940 does not present an opportunity for evasion of obligation and duty under that Act. The way of the dissenter and Jehovah's witnesses is hard. One must en-

¹²⁹ Op. cit., p. 417.

¹³⁰ Sanford, *A Concise Cyclopedia of Religious Knowledge*, 1895, Funk and Wagnalls Co., New York, pp. 81 *et seq.*; 207 *et seq.*; 254 *et seq.*; 348 *et seq.*; 545 *et seq.*; 593 *et seq.*; 682 *et seq.*; 756 *et seq.*; Simpson, *Cyclopedia of Methodism*, 1876, Louis H. Everts, Philadelphia, p. 681 *et seq.*; *The Catholic Encyclopedia*, Vol. 10, p. 237 *et seq.* This vast difference in ceremonies of ordination is recognized as existing today by the Director. No set form of ceremony has been established by the Selective Service System. The Director says: "The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime*, supra.

dure suffering. Before one becomes a full-time "pioneer" minister of Jehovah's witnesses, he must make application, showing that he is qualified and has received appropriate training to enable him to preach and represent the Watchtower Bible and Tract Society as a full-time minister. Investigation is made upon the application, by the Society, and if acceptable the application is approved and the applicant is admitted to the status of a full-time "pioneer" minister. One of the qualifications is that he must be one of Jehovah's witnesses and must have preached the gospel in the same manner as did Christ Jesus and His apostles, publicly, from house to house, and be conducting home Bible studies. He must have previously evidenced his consecration to follow in the footsteps of Jesus by undergoing a public water baptism. The method of ordination prescribed by the Watchtower Bible and Tract Society and Jehovah's witnesses is identical with the requirements and method of ordination with which Christ Jesus complied. He did not attend a parochial or ecclesiastical school. He had been taught and educated for the ministry by his earthly parents at home. He had been brought up "in the nurture and admonition of the Lord."¹³¹ He was ordained by Almighty God, accepting his unbreakable agreement to serve Him and bear witness to the Truth.¹³² This agreement was symbolized by water baptism and thereupon he became ordained to preach "this gospel of the Kingdom".¹³³ After His ordination ceremony by baptism in the river Jordan, Jesus publicly stated the authority of His ordination by reading from *Isaiah 61: 1, 2*: "The Spirit of the Lord [Jehovah] is upon me; because he hath anointed me to preach the gospel to the poor; he hath sent me to heal the broken-hearted, to preach deliverance to the captives, and recovering of sight to the blind, to set at

¹³¹ *Ephesians 6: 4; Deuteronomy 6: 4-7; Mark 6: 2; Luke 2: 39-52; 4: 22.*

¹³² *John 8: 25-32; 18: 37; Hebrews 10: 5-10.*

¹³³ *John 1: 29-34; Matthew 3: 13-17; 24: 14; Acts 10: 37, 38.*

liberty them that are bruised, to preach the acceptable year of the Lord."¹³⁴

Jesus did not call upon the well-educated clergy, scribes and Pharisees, of that day who had been trained in ecclesiastical seminaries, but rather He called upon the "ignorant and unlearned men",¹³⁵ to be His ordained ministers. His apostles were merely authorized or 'anointed', which is synonymous with *ordained*. God himself selected them and consecrated them to His service.¹³⁶

Jesus expressed His opinion and the judgment of Almighty God against the "recognized" orthodox clergy of His day in the most vehement and caustic terms possible.¹³⁷

It is not necessary to know theology, philosophy, art, science and ancient classic languages to preach the gospel. One is not required to wear a distinctive garb, live in a parsonage, ride in an expensive automobile, have a costly edifice in which to preach, and command a high salary, to qualify as a minister of Jehovah God. Jehovah's witnesses emulate their Leader, Christ Jesus, and His apostles, rather than the ancient or modern scribes and Pharisees, the "recognized" orthodox clergy. Instead of a program of choir and organ music followed by discourse on science and philosophy of men, that the people must come to hear in the nominal recognized sects' churches, Jehovah's witnesses devote all their time to studying and teaching the Bible and

¹³⁴ Luke 4: 17-19. Same authority quoted by petitioner to the local board in this case.

¹³⁵ Acts 4: 13; 1 Corinthians 1: 26-29; James 2: 5.

¹³⁶ "These words spake Jesus, and lifted up his eyes to heaven, and said, Father, . . . I have manifested thy name unto the men which thou gavest me out of the world: thine they were, and thou gavest them me; and they have kept thy word. . . . those that thou gavest me I have kept, and none of them is lost, but the son of perdition; . . . Father, I will that they also, whom thou hast given me, be with me where I am." (John 17: 1, 6, 12, 24) "But the anointing which ye have received of him abideth in you, and ye need not that any man teach you: but as the same anointing teacheth you of all things, and is truth, and is no lie, and even as it hath taught you, ye shall abide in [it]."—1 John 2: 27.

¹³⁷ Matthew 23: 13-17, 23-33; Luke 11: 39-53.

carrying God's message to the people at their homes. They are *ministers* in the real and true sense and *serve all* the people. Paul, the apostle, said that the true minister teaches publicly and from house to house.¹³⁸ It is written that Christ Jesus "went round about the villages, teaching," and "preaching the gospel of the kingdom".¹³⁹ The apostle Peter advises each minister of Jehovah God: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, *that ye should follow his steps*."¹⁴⁰ Jesus expressly commanded His twelve ordained ministers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand."¹⁴¹ In the four Gospel accounts of the ministry of Jesus, the words "house" and "home" appear more than 130 times, and in the majority of those times it is in connection with the preaching activity of Jesus, the great Exemplar. His example of carrying the gospel message to the people *at their homes* and in the public ways was "true worship". He said: "But the hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth: for the Father seeketh such to worship him. God is a Spirit: and they that worship him must worship him in spirit and in truth." (*John 4: 23, 24*) His apostle James further describes such worship by ministers of Almighty God at *James 1: 27*: "For the worship that is pure and holy before God the Father, is this: to visit the fatherless and the widows in their affliction, and that one keep himself unspotted from the world."¹⁴²

Jehovah's witnesses realize that the people of the nations are confronted with a clear, serious and immediate danger of everlasting destruction, unless they take their stand on the side of Jehovah God and His Kingdom. The

¹³⁸ Acts 20: 20; cf. Luke 22: 24-27.

¹³⁹ Mark 6: 6; Matthew 9: 35; Luke 8: 1.

¹⁴⁰ 1 Peter 2: 21.

¹⁴¹ Matthew 10: 7, 10-14.

¹⁴² Syriac New Testament, Murdock's Translation.

quickest and most effective way to reach them is at their homes. The duty of such *ordained ministers* of Jehovah's witnesses is likened unto that of a trusted watcher in a weather bureau. If such a one learns that a great storm or tidal wave approaches, he is obligated to sound a warning to his neighbors. Should he fail or refuse to do so, and instead flees to protect his own life without warning others, he would be guilty of a crime of the worst kind.¹⁴³ Faithful Noah preached of an impending disaster upon the world "that then was" and prepared an ark under God's directions, as a witness to his faith in the word of God. The flood came and all were destroyed except Noah and his family.¹⁴⁴ The purpose of the warning given by Jehovah's witnesses is not to threaten the people with destruction if they fail to obey the warning of Almighty God and His commandments. The primary purpose of such warning is to enable all such persons who love righteousness to gain the benefits of living under a government of righteousness, a government of which Christ Jesus shall be the invisible King and the faithful men of old mentioned in *Hebrews*, chapter 11, the rulers as visible princes.¹⁴⁵ The benefits of that government will be unlimited prosperity, perfection of mind and body, everlasting life, the privilege of having property and all material things necessary for the conveniences of man, and the opportunity of marrying and bringing forth children who will never die and will bless God forever. "Of the increase of his government and peace there shall be no end."¹⁴⁶

Every one of Jehovah's witnesses who serves as a full-time minister, like petitioner, has agreed never to discontinue this occupation of preaching. These Jehovah God has

¹⁴³ Cf. *Ezekiel* 38:6.

¹⁴⁴ *Genesis*, chapters 6 to 8; *Hebrews* 11:7; *Luke* 17:26, 27; 2 *Peter* 2:4, 5.

¹⁴⁵ *Psalms* 45:16; *Isaiah* 32:1; *Micah* 5:1-5; *Matthew* 8:11; *Revelation* 11:15.

¹⁴⁶ *Isaiah* 9:6, 7. See also *Psalms* 67:6, 7; 72:1, 4, 7, 8; *Isaiah* 11:5-9; 25:6-8; 65:20-23; *Micah* 4:3, 4; *Revelation* 21:1-4.

anointed and sent forth that they might "offer unto the LORD an offering in righteousness",¹⁴⁷ which offering in righteousness is the praise of Jehovah God and the testimony to His name by devoting themselves faithfully in obedience to His commandment to preach this gospel of the Kingdom. The covenant obligations of each one thus taken into the covenant require faithfulness in proclaiming the name and the kingdom of Jehovah God. They are truly ministers or preachers of this gospel. Such covenant obligations imposed by Jehovah deny to the one in such covenant the privilege of turning aside to engage in other work, since they, by making such covenant, have chosen to follow in the footsteps of Christ Jesus and to sacrifice every right and privilege that would conflict with Jehovah's purpose. The work done by petitioner and other of Jehovah's witnesses is of national importance and is for the welfare of the nation. The Scriptures declare that "covenantbreakers . . . are worthy of death".¹⁴⁸

If there is any one group of Christians on earth today that is preaching the gospel of God's Kingdom, it is Jehovah's witnesses—not the religious clergy. Jehovah's witnesses fit the description of Jesus Christ's apostles. The only way to determine whether one is or is not preaching the gospel is by testing the activity and message by the Word of God. Christ Jesus, the "faithful and true witness", said, "By their fruits ye shall know them."¹⁴⁹ The preaching activity of Jehovah's witnesses reaches millions of people who are members of recognized religious denominations,

¹⁴⁷ *Malachi* 3:3; *Hebrews* 13:15; *Philippians* 3:7-14.

¹⁴⁸ *Romans* 1:31, 32. See also *Ezekiel* 3:17-19; "Son of man, I have made thee a watchman unto the house of Israel: therefore hear the word at my mouth, and give them warning from me. When I say unto the wicked, Thou shalt surely die; and thou givest him not warning, nor speakest to warn the wicked from his wicked way, to save his life; the same wicked man shall die in his iniquity; but his blood will I require at thine hand. Yet if thou warn the wicked, and he turn not from his wickedness, nor from his wicked way, he shall die in his iniquity; but thou hast delivered thy soul."—*Ezekiel* 33:7-9; *Jeremiah* 26:20-23; *Hebrews* 10:38; 2 *Peter* 2:20-22.

¹⁴⁹ *Matthew* 7:15-20; *John* 14:21, 23; *Revelation* 3:14.

and comforts those who are crying and sighing because of the abominations committed therein.¹⁵⁰ Also, there are more than seventy million persons in the United States who do not belong to any religious organization or attend "church" services of any kind. It is just as important to maintain the morale of these many millions as it is to preserve the morale of those who belong to some "recognized" religious organization. How would these millions of people obtain spiritual sustenance and comfort in their sorrow, unless someone provided them with such? Few "recognized" religious clergy call upon these people at their homes; *they* expect the people to come to their church edifices to receive what they have to offer. Jehovah's witnesses have answered the need of these millions and carry their message of comfort and hope into the people's homes. This is a convenience and contributes greatly to morale of people of good-will who desire to learn of and concerning mankind's only hope—the Kingdom or Theocracy of Almighty God, through Christ Jesus.

During the year 1941 each full-time pioneer minister of Jehovah's witnesses served on an average two hundred fifty small congregations of individuals meeting in the homes of the people, by means of making "back-calls" as did Paul and Barnabas,¹⁵¹ by conducting Bible studies in the homes of the people. In addition to these regular recipients of the spiritual comfort of such full-time ministers, each called upon an average of six thousand persons annually. These full-time pioneer ministers placed with the people a total of seven and a half million pieces of literature containing Bible sermons.¹⁵²

During the year 1941 there were 4,049 full-time pioneer ministers,¹⁵³ half of which were men, and approximately one

¹⁵⁰ Ezekiel 9:4; Isaiah 61:1-3.

¹⁵¹ Acts 15:36.

¹⁵² See 1942 *Yearbook of Jehovah's witnesses*, pp. 40-48. Compare the work done by the part-time ministers (company publishers), who placed twelve and a half million pieces of literature.

¹⁵³ *Op. cit.* p. 42.

fourth of which were of the age bracket fixed by the Selective Training and Service Act for men liable for induction.¹⁵⁴

Section 5 (d) of the Selective Training and Service Act was specifically designed to provide *absolute exemption* for those persons whose full time is devoted to the performance of such ministerial activity as is done by petitioner and other full-time pioneer ministers of Jehovah's witnesses. Petitioner is exempt under the act.

C

The uncontradicted evidence shows that petitioner is a duly ordained minister of religion regularly performing duties as such within the purview of Section 5 (d) of the Selective Training and Service Act and Section 622.44 of the Selective Service Regulations.

The uncontradicted evidence showed that petitioner complied with all the standards required by the Selective Service System and the law pertaining to ordained ministers of religion. Government's Exhibit No. 2 (Selective Service questionnaire) showed without dispute that petitioner was a pioneer minister for the Watchtower Bible and Tract Society, preaching the gospel of God's kingdom. (R. 52) Such exhibit also established, without dispute, that petitioner was a duly ordained minister of religion and had been since July 1, 1930. R. 56.

The youthfulness of petitioner when he began his ministry does not affect his qualifications when he filed his questionnaire. The history of his preaching at an early age is not unusual to true followers of Christ. It may be assumed that his Christian parents brought him up "in the nurture and admonition of the Lord" and put him into the "temple

¹⁵⁴ Compare the number of part-time ministers (company publishers) for the year 1941, to wit, 52,636, of which approximately 40 percent were male, with the same proportion subject to Selective Service. *Op. cit.* p. 42. The problem of dealing with Jehovah's witnesses in classifications and prosecutions is reviewed in the Director's Second Report, *Selective Service in Wartime*, pp. 243, 321-322.

service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at *Deuteronomy 6: 4-7*.¹⁵⁵

TIMOTHY was *ordained* to preach as a disciple when but a small boy. (*Acts 16: 1-3*) Paul, the apostle, wrote this "son of faith" thus: "Let no man despise thy youth; but be thou an example of the believers, in word, in conversation [conduct], in charity [love], in spirit, in faith, in purity."¹⁵⁶

SAMUEL, the prophet, was consecrated for service in the temple when very small and of tender age.¹⁵⁷

CHRIST JESUS, when but twelve years of age, was already about his "Father's business", discussing the Scriptures.¹⁵⁸ When preaching the Gospel later on, He said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God."¹⁵⁹ Regardless of the age at which petitioner began his ministry, there is nothing to show that he was disqualified to act as a minister of Almighty God at the time of his classification and, as such, was and is entitled to complete exemption.

Petitioner's Exhibit C also corroborates his claim as an ordained minister. (R. 67) It affirmatively established that petitioner was recognized by the Watchtower Bible and Tract Society as a full-time minister. (R. 67, 68) Government's Exhibit No. 2 and Petitioner's Exhibit C showed that petitioner came within the purview of Section 5 (d) of the Act. It established that he devoted his entire life to the furtherance of the beliefs of Jehovah's witnesses and that

¹⁵⁵ *Ephesians 6: 1-4*: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also *Ecclesiastes 12: 4*; *Psalms 71: 17*; *Genesis 18: 19*.

¹⁵⁶ *1 Timothy 4: 12*; *2 Timothy 3: 15*; *1 Corinthians 4: 17*, Am. Rev. Ver.

¹⁵⁷ *1 Samuel 1: 24*; *2: 11, 28*.

¹⁵⁸ *Luke 2: 46-49*.

¹⁵⁹ *Luke 18: 16*; see also *Matthew 18: 1-6*; *Psalms 8: 2* ("Out of the mouth of babes and sucklings hast thou ordained strength"); *Psalms 148: 12, 13* ("Both young men, and maidens; old men, and children: Let them praise the name of the Lord: for his name alone is excellent; his glory is above the earth and heaven"); *Proverbs 8: 32*.

he performed the functions normally performed by other regular or duly ordained ministers of religion by his calling upon people at their homes and comforting the poor and needy. It showed that petitioner was regarded by Jehovah's witnesses in the same manner in which other regular and duly ordained ministers of religion are regarded by and among *their* associates.¹⁶⁰ (R. 52, 67-69) There is nothing in the record to dispute petitioner's claim as an ordained minister. The Cover Sheet and his file at the local board established his claim as a duly ordained minister without contradiction. There was no evidence to show that petitioner should be given any classification except as a duly ordained minister. He was recognized by the Watchtower Bible and Tract Society, the governing body for Jehovah's witnesses.

Falbo's employment as a clothing salesman and clerk during the years 1937-39 is not sufficient to prevent his claim for exemption. His status as a part-time minister from 1937-39 is immaterial. The Government's evidence shows that petitioner is exempt as a minister of a recognized religious organization. The undisputed evidence shows that petitioner is exempt.

In determining whether or not the motion for directed verdict should be granted, if the evidence reveals that the Watchtower Bible and Tract Society is a recognized religious organization and that petitioner is in good faith a duly ordained minister of that Society and one of Jehovah's witnesses devoting his full time to preaching the gospel, and his Selective Service questionnaire shows that fact, then it is the duty of the Court to hold that the motion for directed verdict should be sustained. This conclusion can be reached regardless of what rule is applied in reviewing the action of the local board. The burden is upon the government to establish guilt of petitioner beyond a reasonable doubt, and this has not been established.

¹⁶⁰ Opinion No. 14, par. 5. Appendix -pp. 39a, 42a.

The issue is whether the petitioner is a delinquent under the Act. A delinquent is one who has no just cause or excuse for *not* reporting. The undisputed evidence shows that petitioner *had* and has a good cause for *not* reporting because exempt from the terms of the Act. There is literally no evidence whatsoever to support the verdict of the jury, and accordingly it is the duty of the Court to reverse.¹⁶¹

The evidence leads to only one conclusion. It is uncontradicted that petitioner is a minister; but even if it *evenly* preponderated the conviction cannot stand. If the evidence on exemption *evenly preponderates*, it is insufficient to sustain a conviction in a criminal case in federal court.¹⁶² There is no evidence to show that petitioner was not a minister. Each item of guilt required by the statute must be proved as if the whole case rested upon it.¹⁶³ The law does not cast upon the petitioner the burden of satisfying the court as to his innocence.¹⁶⁴

In some cases where the courts have considered the evidence on the claim for exemption as a minister, the authors of such opinions have taken occasion to make derogatory remarks as to the *ordination* of Jehovah's witnesses, and those authors have substituted their own *private*, personal idea and knowledge of religious practices in some of the orthodox, recognized, *popular* sects, so as to exclude recognized dissentients—such as Jehovah's witnesses—who engage in no formal ceremonies but follow exclusively in the footsteps of Christ Jesus, the principal ordained minister of God's gospel. In written opinions such *private* ideas of members of the judiciary have been substituted, needlessly and wrongfully, for the Selective Service Regulations and

¹⁶¹ *Zuziak v. United States*, 119 F. 2d 140; *Davis v. United States*, 160 U. S. 469; *Edwards v. United States*, 7 F. 2d 357.

¹⁶² *Edwards v. United States*, *supra*; *McChintock v. United States*, 60 F. 2d 839, 842 (C. C. A. 10); *United States v. Murphy*, 253 F. 404, 407; *Brady v. United States*, 24 F. 2d 404 (C. C. A. 8).

¹⁶³ *Smith v. United States*, 208 F. 131.

¹⁶⁴ *Davis v. United States*, 160 U. S. 469, *supra*.

the authoritative Opinion No. 14 of National Headquarters of Selective Service.¹⁶⁵

This Court will not be misled by any such sophistry and narrowed view of religious concepts and practices, but will apply a liberal rule so as to protect equally the *unpopular* and keep them on the same high preferred level with the clergy and the *popular*, orthodox, recognized religious sects.¹⁶⁶

In determining whether or not the motion for directed verdict should be granted on the ground that petitioner is an ordained minister, the Court cannot require that the evidence show petitioner performs functions normally performed by other regular ministers of religious organizations and that petitioner is regarded by other of Jehovah's witnesses in the same manner in which other regular or duly ordained ministers of recognized religious organizations are regarded. It would be the same as saying that if a priest is not regarded as a bishop, he would not be exempt. Among the various groups of worshipers and religionists in this land the standards and practices differ. What is normally performed by a minister of one denominational church is not performed by the minister of another. What is considered salvation for one is considered as damnation by the other. This, however, is not a factor for the Court to apply here in deciding whether the motion for directed verdict should be granted. The question is: Was the petitioner an *ordained minister*, recognized by the Watchtower Bible and Tract Society, regularly performing duties as such? If so, the motion for directed verdict should be sustained.¹⁶⁷

Here let judicial notice be taken of the clear, fair and

¹⁶⁵ *Buttice v. United States*, 130 F. 2d 172; *Fletcher v. United States*, 129 F. 2d 262; *Rase v. United States*, 129 F. 2d 204. Cf. excerpts from *Second Report of Director of Selective Service*, *infra*, pp. 90-91.

¹⁶⁶ *Murdock v. Pennsylvania*, 319 U. S. —, 63 S. Ct. 870.

¹⁶⁷ *In re Reinhart*, *supra*; *Ex parte Cain*, *supra*.

wholly *American* definitions recently expressed to the President by the Director of Selective Service in his *Second Report*: "Freedom to worship is one of the four freedoms for which we fight. Even in days before we realized that our civilization was to be challenged, even to its religious roots, it was felt that regular and duly ordained ministers should be exempted from military duty. There was a natural repugnance toward any proposal for drafting ministers of religion for training and service. The first bill submitted to the Congress contained this provision and was readily accepted. . . .

"The ordinary concept of 'preaching and teaching' is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message 'from the housetops' or write it 'upon tablets of stone'. He may give his 'sermon on the mount', heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the Cross. He may carry his message with the gentleness of a Father Damien to the bedside of the leper, or hurl inkwells at the devil with all the crusading vigor of a Luther. But if in saying the word or doing the thing which gives expression to the principle of religion, he conveys to those who 'have ears to hear' and 'eyes to see', the concept of those principles, he both preaches and teaches. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or

he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.

“The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's witnesses, who sell their religious books, and thus extend the Word. It includes lay brothers in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion.”
—*Selective Service in Wartime*, Second Report of the Director of Selective Service [U. S. A.] 1941-42, pp. 239-241.

Here the issue is clear-cut, simple, well-defined and easily determinable. It does not involve the niceties and difficulties that would be encountered in determining whether one was in fact a conscientious objector. The many intricate facts and circumstances involved in determining mental view necessary to consider in deciding whether or not one is a conscientious objector do not subsist in determining whether or not one is an ordained minister of religion. Such a rule would in fact be establishing a *state religion* and reviving the yoke of joinder of state and church which was thrown off the people's backs long before the Revolutionary War. It would be a revival of the ancient Ordination Act passed by Parliament in 1644.

The policy or practice of orthodox and popularly recognized ecclesiastic organizations cannot be used as a rule to determine and measure the propriety of action by dissentient groups.

In this case it is not necessary for this Court to determine whether a *part-time minister* of Jehovah's witnesses would under the same circumstances be entitled to relief here sought. That is a matter unnecessary for this Court to decide.¹⁶⁸

Petitioner's name did not appear on the certified official list identified in Opinion No. 14.¹⁶⁹ He gives a valid reason for that omission. He was on the Society's *sick list* of pioneer full-time ministers of the Watchtower Bible and Tract Society at the time the *certified official list* was prepared, and was temporarily suspended from the Society's *active list*. (R. 69) The *official list* referred to in Opinion No. 14 is no more than information from Selective Service National Headquarters that such headquarters is of the opinion that such individuals come within the purview of Section 5 (d) of the Act.¹⁷⁰ It is evidence that National Headquarters is satisfied that the individuals have a standing on the same basis as other duly ordained ministers of religion. It does not mean that other persons who are in fact ministers and whose names do not appear on such list are not entitled to exemption and classification in IV-D under the purview of Section 5 (d) of the Act and Section 622.44 of the Regulations. The inclusion of petitioner's name on the list would not *ipso facto* entitle him to classification as a minister, nor could it be made a prerequisite to such classification. The inclusion of a name on the list is considered by National Headquarters and the Selective Service System as evidence which may be considered by the local and appeal boards in classifying a registrant. The presence of the name on the list is not made the conclusive and exclusive evidence. If it were so, the National Headquarters, the administrative agency, would be usurping the functions which Congress

¹⁶⁸ Cf. *Ex parte Cain*, supra; *Hauckes v. Morey*, supra; *Kipps v. Lane*, supra; *Offord v. Hiscock*, supra.

¹⁶⁹ Appendix p. 38a.

¹⁷⁰ Par. 4 of Opinion No. 14. Appendix p. 38a; par. 3 of amended opinion, appendix pp. 41a-42a.

delegated to the local boards, the operational agencies entrusted with responsibility and duty to be performed by each of such boards in *co-operation* with (not *exclusively independent* of) the Director of Selective Service and his headquarters staff. Obviously, disunity, disintegration and defeat of the entire purpose of Selective Training and Service Act would follow were each local (or appeal) board accorded the liberty and right to function independently—as a *unit* detached from and in no way conforming to right standards and equitable practices defined and established by the Director's office.

The *certified official list* of Jehovah's witnesses was established as a convenience to the Selective Service System and the Watchtower Bible and Tract Society and was not intended to *exclude* from consideration by the local boards the claim of exemption by any full-time minister whose name did not appear on such list. It does not mean that those persons whose names are not on the list are not recognized by the Society as ministers. It is not the practice of the Selective Service System to classify as ministers only those of Jehovah's witnesses whose names appear on such list.¹⁷¹ As a matter of fact, great numbers of Jehovah's witnesses whose names do not appear on the list have been exempted and classified properly in IV-D.

D

Claiming to be a "conscientious objector" did not militate against the claim of petitioner for complete exemption as an *ordained minister*.

The Selective Service questionnaire (Form 40) Series X makes provision for information as to whether the registrant is a "conscientious objector". Petitioner maintaining a strict position of neutrality and being conscientiously opposed to *his* participation in combatant or noncombatant

¹⁷¹ See Opinion No. 14 as amended, par. 3; Appendix pp. 41a-42a.

military service, indicated such on the questionnaire. (R. 56) Pursuant to the law and regulations he filed Special Form for Conscientious Objector (Form 47) disclosing that he was a conscientious objector. (R. 63-66) In considering all classifications it is the duty of the board *first* to determine whether or not the questionnaire shows that registrant should be placed in some classification that would *exempt* him from induction. It was the duty of the board first to determine whether or not petitioner should be placed in Class IV-D.¹⁷³ On appeal, it was the first duty of the appeal board to determine whether petitioner should be classified in one of the classes set forth in Section 623.21 of the Regulations.¹⁷³ There is nothing incompatible under the law and regulations in one being an ordained minister and conscientiously opposed to his participation in war, by reason of his ministerial standing, at the same time. As a matter of fact, there are many such that are ordained ministers who are also conscientious objectors. Witness the Mennonites, Society of Friends and Brethren ministers. The failure of the Department of Justice to recommend concerning the exemption claim, IV-D classification, is not material because that department does not have jurisdiction to recommend on any claim except for conscientious objector.

E

The action of the local board and the appeal board in denying petitioner's claim for exemption was not supported by the evidence, was contrary to the evidence, contrary to law, arbitrary and capricious.

This proposition must be determined if the court does not review *de novo* the jurisdictional fact of exemption or

¹⁷³ Reg. s. 623.21 (c). Appendix p. 19a.

¹⁷³ Reg. s. 627.25 and 627.26. Appendix pp. 22a-24a. "If an appeal involves a question of whether or not the registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal must first determine whether he should be classified in Class I-C, Class IV-E, Class IV-C or Class IV-D." Lewis, *Appeal Procedure Under the Selective Service Law* (1942), 17 Ind. L. J. 273, 281-282.

if the ordinary procedure of trial of criminal cases is not applied so as to acquit.

Petitioner says that the undisputed evidence shows that he was an ordained minister entitled to exemption. The I-A and IV-E classifications and the act of the local board ignoring petitioner's claim for IV-D classification were made "in the teeth of all the evidence and are therefore dishonest." A *dishonest* classification is unlawful and can be attacked.¹⁷⁴ A decision without evidence or which is contrary to the undisputed evidence is dishonest. A decision which is dishonest is arbitrary and capricious. Assume that a local board arbitrarily classified the vice-president of the United States in Class I-A or Class IV-E and immediately ordered him to report for induction. If his questionnaire showed that he was the vice-president the action of the local board would be clearly dishonest, arbitrary and capricious and such action of the board could be contested and claimed to be invalid on trial of an indictment for refusal to report for induction.¹⁷⁵

The term "supported by the evidence" means evidence which is substantial, affording a substantial basis of fact.¹⁷⁶ Uncorroborated hearsay or rumor does not constitute "substantial evidence". Substantial evidence signifies more than a scintilla, and never mere hearsay.¹⁷⁷

Manifestly, when the narrow and limited scope of inquiry relating to the review of findings by administrative boards in civil actions is applied in this case it becomes plain that the local board erred and the order to report for induction was void. Accordingly, the defense should be sustained as a matter of law.

¹⁷⁴ *Johnson v. United States*, 126 F. 2d 242, 247.

¹⁷⁵ *Goff v. United States* (decided May 4, 1943) (C. C. A. 4), *supra*.

¹⁷⁶ *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 282.

¹⁷⁷ *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197.

The judgments of the courts below should be reversed and the indictment ordered dismissed because the government's evidence has been fully developed and no good purpose would be served by ordering a new trial, if this Court reaches the conclusion that the trial court erred in denying the motion to dismiss.

It is a fundamental rule that if the undisputed evidence shows that petitioner is not guilty of the offense charged and upon another trial the evidence would be substantially the same or could not be different, it is the duty of the appellate court to reverse, set aside the verdict and render a judgment that the indictment be dismissed, rather than to set aside the verdict and order a new trial. This is especially true where the court below does not have jurisdiction. *A fortiori*, if the local board, upon whose order the indictment is based, is without jurisdiction, the rule would be the same. This case is therefore governed by *Smith v. United States*, 150 U. S. 50, and *Baltimore Carolina Line v. Redman*, 295 U. S. 654.

If this Court orders a *new trial*, that will not correct the prior entirely unlawful classification of petitioner. Upon another trial the local board will continue to be without jurisdiction since the undisputed evidence by the Government and all the evidence shows that petitioner is exempt from all training and service under the Act.

The judgment of the courts below should be reversed, the verdict set aside, the trial court ordered to dismiss the indictment.

THREE

This Court should hold that the trial court erred in charging the jury that petitioner could not challenge the validity of the induction order because the determination by the local board was binding upon the court and jury.¹⁷⁸

The trial court instructed the jury that the action of the local board was binding upon the court and jury who could not question the action of the board, and that petitioner could not question the classification in a criminal prosecution, but only by way of petition for writ of habeas corpus. (R. 41) Petitioner duly objected to this part of the charge, objection was overruled, with exception to petitioner. R. 42.

This was an improper charge and was subject to the objection made in that it deprived petitioner of his defenses contrary to law. The charge is reversible error. *Bird v. United States*, 180 U. S. 356; *Starr v. United States*, 153 U. S. 614; *Quercia v. United States*, 289 U. S. 466; *Konda v. United States*, 166 F. 91; *Burton v. United States*, 196 U. S. 283; *Bruno v. United States*, 308 U. S. 287; *Pierce v. United States*, 314 U. S. 306.

For this procedural error the judgment should be reversed and a new trial ordered.

FOUR

This Court should hold that upon the trial of the indictment petitioner was entitled to have the trial court give requested charges submitting his defense that if the jury found petitioner was a minister of religion and that the local board had notice thereof from his Selective Service questionnaire, or if the jury found that the board had such notice, the jury should return a verdict of "not guilty".¹⁷⁹

This point is argued with point FIVE.

¹⁷⁸ This point supports assignment of error number 10. R. 97-98.

¹⁷⁹ This point supports assignment of error number 11. R. 98-99.

FIVE

This Court should hold that upon the trial of the indictment petitioner was entitled to have the trial court give requested charges submitting his defense that if the board was prejudicial, unfair, arbitrary and capricious in making his classification, the jury should return a verdict of "not guilty".¹⁸⁰

The petitioner duly and timely requested the court to charge the jury that if the evidence before the local board and appeal board showed that he was duly ordained or a regular minister of religion, customarily performing duties as such, that the jury should return a verdict for the petitioner. (R. 42, 43) This request was refused, to which exception was allowed. R. 43.

Petitioner also duly and timely requested the court to charge the jury that if the local board and appeal board acted arbitrarily, capriciously and unfairly toward petitioner in construing his claim for classification, they should acquit the petitioner. (R. 42) This request was denied and exception allowed petitioner. R. 43.

It is fundamental that all issues of fact to which applicable rules of law can be applied must be submitted to the jury. It is unnecessary to cite authority to support this proposition. If petitioner was entitled to urge his defense presented by the evidence, it was the duty of the court to charge the jury in harmony with the law. It ought to suffice to cite *United States v. Murdock*, 290 U. S. 389, 396, which involved an analogous requested charge. In that case the court said, "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief."

For this procedural error the judgment should be reversed and a new trial ordered.

¹⁸⁰ This point supports assignment of error number 11. R. 98-99.

SIX

This Court should hold that upon the trial of the indictment petitioner was entitled to have the jury consider oral testimony and documentary evidence offered by petitioner to show that he was regularly practicing as a minister of religion and that the local board had notice of such status before classification.¹⁸¹

The final classification was given by the board in July, 1942, after the first classification of I-A. While petitioner's appeal was before the appeal board, a hearing was conducted by the Hearing Officer of the Department of Justice with reference to petitioner's claim as a conscientious objector. At that hearing the hearing officer received additional evidence, as follows: (1) Certificate of ordination duly issued by the Watchtower Bible & Tract Society, Inc. (R. 71); (2) Letter signed by petitioner, explaining his illness and the fact that he resumed his full-time pioneer ministry January, 1941, and had since been engaged in such ministry. It showed that his privileges of service had increased, that he was recognized by the Watchtower Society as a minister and asked that his claim for IV-D be considered (Petitioner's Exhibit E, R. 72); (3) Affidavit of John Paloney (Petitioner's Exhibit F, R. 73); (4) Statement signed by 29 persons declaring that they recognized petitioner as a pioneer minister for the Watchtower Bible & Tract Society (Petitioner's Exhibit G, R. 74-75); (5) Affidavit of Anthony De Fazio, not one of Jehovah's witnesses, stating that he regarded petitioner as a pioneer minister of the Watchtower Bible and Tract Society (Petitioner's Exhibit H, R. 76); (6) Letter of Watchtower Bible & Tract Society addressed to the United States hearing officer and endorsed by him, explaining the history of petitioner's connection with the Society as a minister and corroborating his

¹⁸¹ This point supports assignments of error numbers 3, 4, 5, 6, 7 and 8. R. 90-96.

temporary suspension due to illness (Petitioner's Exhibit I, R. 77).

Each of these documents, respectively, was identified by the Hearing Officer and made a part of the petitioner's Cover Sheet and local board file. Each of these documents was produced at the trial, from the local board's files, by the clerk of the local board, who was the Government's witness. (R. 20) Each of the documents was excluded from evidence. R. 29, 30, 31.

The Selective Service Regulations require that all evidence that is considered by the board in arriving at the classification should be placed in the file and made a part thereof.¹⁸² The undisputed evidence showed that these documents were considered by the boards in arriving at petitioner's classification. Having been considered, it was the duty of the court to permit the petitioner to introduce them in evidence so the jury might consider them when concluding whether or not the local board had jurisdiction, or acted contrary to the undisputed evidence, or classified petitioner without substantial evidence, and whether or not the board acted arbitrarily and capriciously. Similar affidavits have been held admissible by this Court in other cases.¹⁸³

Edmund Burke's Report to the House of Commons of the Hastings trial of 1794 (31 *Parl. Hist.* 324) makes specific application of the fundamental rule of evidence violated in the instant case: "Your Committee conceives that the trial of a cause is not in the arguments or disputations

¹⁸² Reg. s. 623.2. * * * "Information considered for classification. The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." See, also, par. 6, Opinion No. 14, Appendix pp. 39a, 43a.

¹⁸³ *Re Bollman*, 4 Cranch 75; *Chicago & N.W.R. Co. v. Ohle*, 117 U.S. 123.

of the prosecutors and the counsel, but in the evidence; and that to refuse evidence is to refuse to hear the cause. Nothing, therefore, but the most clear and weighty reasons ought to preclude its production. Your Committee conceives that when evidence, on the face of it relevant, that is connected with the party and the charge, was denied to be competent, the burden lay upon those who opposed it, to set forth the authorities, whether of positive statute, known recognized maxims and principles of law, passages in an accredited institute, code, digest, or systematic treatise of laws, or some adjudged cases, wherein the Courts have rejected evidence of that nature."

For this procedural error the judgment should be reversed and a new trial ordered.

SEVEN

This Court should hold that upon the trial of the indictment petitioner was entitled to have the jury consider oral testimony offered by petitioner to show that the local board denied him a hearing on personal appearance and that the members were prejudiced against petitioner.¹⁸⁴

For the purpose of showing that the local board did not have jurisdiction to order the petitioner to report for induction, petitioner offered certain oral testimony and witnesses to establish that he was a duly recognized ordained minister of religion, customarily performing duties as such.

Angelo Galuppo offered to show on behalf of petitioner, that he had known petitioner since 1930, knew the reputation of petitioner for truth and veracity to be good, that petitioner's reputation is that of an ordained minister of religion, that petitioner is a "special pioneer" minister engaging in ministerial duties 175 hours per month, that petitioner had been engaged as a full-time minister since 1940

¹⁸⁴ This point supports assignment of error number 9. R. 96-97.

except for the time he was ill. This evidence was excluded. Petitioner was allowed an exception. R. 34-36.

Petitioner offered to testify in his own behalf concerning his full-time ministerial status since September 1, 1940, and also as to his increased privileges in the Lord's service as a "special pioneer" full-time minister, and that prior to his appointment as a full-time pioneer minister in 1940 he devoted not less than 150 hours monthly to actual ministerial work of preaching the gospel. This evidence was excluded and exception allowed. R. 36-39, 72.

The evidence was material as direct testimony in proof of the petitioner's defense. But, if considered immaterial, for that purpose it was admissible for rebuttal purposes and in explanation of certain questions propounded by the United States Attorney. R. 33-34.

Petitioner also offered to show that the board expressed prejudice against him, and this was offered to show that the board violated Section 623.1 (c) of the Selective Service Regulations,¹⁸⁵ and that the board denied him a hearing as required by the Regulations,¹⁸⁶ which evidence also was offered to show that the board was arbitrary, capricious and prejudiced. This evidence was excluded and exception allowed petitioner. R. 32-33.

This evidence was vitally material and should have been admitted. It was offered for the purpose of showing that the board had violated procedural requirements for administrative boards.¹⁸⁷

For this procedural error the judgment should be reversed and a new trial ordered.

¹⁸⁵ "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice."

¹⁸⁶ Reg. s. 625.1 and 625.2.

¹⁸⁷ *Morgan v. United States*, 298 U. S. 468; 304 U. S. 1; 304 U. S. 23; 307 U. S. 183; 313 U. S. 400; *Cooley v. O'Connor*, 12 Wall. 391; *Crawford v. United States*, 212 U. S. 183; *McGinnis v. California*, 247 U. S. 95.

Conclusion

There are no practical considerations which justify the conclusion that one exempt from training and service and over whom the local board does not have jurisdiction cannot urge in defense to an indictment that he is under no duty under the act for these reasons. The denial of *due process of law* and the *right to defend* does not strengthen the Selective Training and Service Act and does not discourage violations. The arbitrary fiat of an administrative board must not be shielded at the cost of the integrity of the United States courts.

A holding by this Court in favor of the petitioner would not throw open the doors of the courts to registrants subject to training and service, not exempt, to ask the courts to reclassify them. The issue presented here concerns only that class of persons exempt and of whom the board does not have jurisdiction.

The judgment of the trial court should be reversed, the verdict set aside, the indictment dismissed and petitioner ordered discharged because the local board did not have jurisdiction to order petitioner to report for induction. The motion to dismiss should have been sustained. The action of the courts below is reversible error. At the close of the trial the indictment should have been dismissed by the court *sua sponte*. This Court should order the indictment

dismissed irrespective of a motion, exception or assignment of error because it is plain and fundamental error to convict in the circumstances.

If the Court concludes that this is a question for the determination of the jury, then it is the duty of the Court to order a new trial because of the procedural errors, to withdraw exceptions to the charge of the court, refusal of requests for charges, exclusion of documentary evidence and oral testimony duly offered by petitioner, all of which rulings were based on the illegal holding that no defense could be made to the indictment on account of the illegal classification and order to report for induction.

Petitioner prays for such other and further relief as this Court seems appropriate in the circumstances.

Respectfully and confidently submitted,

HAYDEN C. COVINGTON

VICTOR F. SCHMIDT

Attorneys for Petitioner

HAYDEN C. COVINGTON

of Counsel

FILE COPY

Office - Supreme Court
FEB 23 1943
CHARLES CLARKE COOK
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA



ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

A P P E N D I X
FOR PETITIONER'S BRIEF

HAYDEN C. COVINGTON

VICTOR F. SCHMIDT

Attorneys for Petitioner

HAYDEN C. COVINGTON, *of Counsel*

INDEX

TABLE OF CONTENTS

| Number and Title of Cause | PAGE |
|---|---------|
| <i>Front Cover</i> | |
| THIS INDEX | i-ix |
| THE SELECTIVE TRAINING AND SERVICE ACT OF | |
| 1940, as amended, <i>Excerpts from</i> | 1a-11a |
| Sec. 2, Registration in general | 1a |
| Sec. 3, Training and service in general | 1a |
| Sec. 5, Persons not required to register; Deferment, exemption, and relief from training and service | 3a |
| Sec. 10, Rules and regulations; Selective Service System | 8a |
| Sec. 11, Penalties | 10a |
| SELECTIVE SERVICE REGULATIONS; SECOND EDITION, <i>Ex-</i> | |
| <i>cerpts from</i> | 11a-34a |
| Sec. 601.5, Delinquent | 11a |
| Sec. 601.7, Inducted man | 12a |
| Sec. 601.8, Induction station | 12a |
| <i>National Administration</i> | |
| Sec. 603.1, Director of Selective Service | 12a |
| <i>State Administration</i> | |
| Sec. 603.11, Governor | 13a |
| Sec. 603.12, State Director of Selective Service | 13a |
| <i>Boards of Appeal</i> | |
| Sec. 603.21, Area | 13a |
| Sec. 603.22, Composition and appointment | 13a |
| Sec. 603.24, Jurisdiction | 14a |
| <i>Local Boards</i> | |
| Sec. 603.51, Area | 14a |
| Sec. 603.52, Composition and appointment | 14a |
| Sec. 603.54, Jurisdiction | 15a |
| <i>In General</i> | |
| Sec. 611.5, Responsibility for performance of duty | 15a |
| <i>Available for or in Military Service</i> | |
| Sec. 622.12, Class I-A-O: Available for noncombatant military service; conscientious objector | 16a |

Table of Contents

| | PAGE |
|---|------|
| Sec. 622.13, Class I-B: Formerly available for limited military service | 16a |
| Sec. 622.14, Class I-B-O: Formerly available for non-combatant limited military service | 17a |
| Sec. 622.44, Class IV-D: Minister of religion or divinity student | 17a |
| <i>Available for Work of National Importance Under Civilian Direction</i> | |
| Sec. 622.51, Class IV-E: Available for work of national importance; conscientious objector | 17a |
| <i>Deferred by Reason of Being Unfit</i> | |
| Sec. 622.61, Class IV-F: Morally unfit | 18a |
| Sec. 622.62, Class IV-F: Physically or mentally unfit | 18a |
| <i>Commencement of Classification</i> | |
| Sec. 623.1, General principles of classification | 19a |
| <i>Classification before Physical Examination</i> | |
| Sec. 623.21, Consideration of classes not requiring physical examination | 19a |
| <i>Appearance before Local Board</i> | |
| Sec. 625.1, Opportunity to appear in person | 20a |
| Sec. 625.2, Appearance before local board | 21a |
| <i>Procedure for Taking Appeal</i> | |
| Sec. 627.12, Statement of person appealing | 22a |
| Sec. 627.25, Special provisions where appeal involves claim that registrant is a conscientious objector | 22a |
| Sec. 627.26, Decision of board of appeal | 24a |
| Sec. 628.1, Who may appeal to the President from any determination of a board of appeal | 24a |
| Sec. 628.2, Appeal to the President | 25a |
| Sec. 628.7, Appeal to the President stays induction | 25a |
| <i>General</i> | |
| Sec. 633.1, Order to Report for Induction | 25a |
| Sec. 633.9, Induction | 26a |
| Sec. 642.1, Mailing notice of delinquency | 27a |
| Sec. 642.2, Investigation of delinquency | 27a |
| Sec. 642.3, Disposition of delinquencies | 28a |
| Sec. 642.4, Reporting delinquents to United States district attorney | 28a |

Table of Contents

| | PAGE |
|--|------|
| Sec. 642.5, Local board action subsequent to reporting a delinquent to United States district attorney | 29a |
| Sec. 651.8, Final-type physical examination at induction station | 29a |
| <i>Assignment to Work of National Importance</i> | |
| Sec. 652.1, Report of conscientious objector to Director of Selective Service | 29a |
| Sec. 652.2, Assignment by Director of Selective Service | 30a |
| <i>Delivery of Persons who have been Assigned to Work of National Importance under Civilian Direction</i> | |
| Sec. 652.11, Preparation and distribution of Order to Report; delinquency of IV-E registrants | 31a |
| Sec. 652.12, Transportation to camp | 32a |
| Sec. 652.13, Jurisdiction of local board while registrant is engaged in work of national importance | 33a |
| Sec. 652.14, Period of service | 33a |
| <i>Rules for Camps Operated by the National Service Board for Religious Objectors</i> | |
| Sec. 691.17, Discipline | 34a |
| NOTES—PART 622 | |
| <i>Class IV-D</i> | |
| Note 22, Catholic Lay Brothers | 34a |
| Note 24, Jehovah's witnesses | 35a |
| Opinion, National Headquarters, Selective Service System, Vol. III, No. 14, June 12, 1941: Subject, <i>Ministerial status of Jehovah's witnesses</i> | 36a |
| Opinion, National Headquarters, Selective Service System, Vol. III, No. 14 (Amended), November 2, 1942: Subject, <i>Ministerial status of Jehovah's witnesses</i> | 40a |
| Opinion, National Headquarters, Selective Service System, Vol.—, No. 2, January 25, 1941: Subject, <i>Classification—Exemption of Catholic Lay Brothers on Account of Being Regular Ministers of Religion</i> | 43a |
| Letter (copy of) August 7, 1940, from Congressman Martin J. Kennedy appearing in printed "Hearings Before the Committee on Military Affairs, House of Representatives, Seventy-sixth Congress, Third Session, on H. R. 10132" (pages 628-630), as to <i>Total exemption of ordained clergymen, of seminarians, and of Brothers</i> | 47a |

SUBJECT INDEX

[Section numbers over 600 refer to Selective Service Regulations. Other section numbers refer to Selective Training and Service Act, as amended prior to December 1, 1942.]

| AGE: | Section | PAGE |
|-------------------------------|-----------|-------|
| Deferment by age groups | 5 (e) (2) | 6a |
| Registration | 2 | 1a |
| Training and service | 3 (a) | 1a-2a |

APPEAL:

| | | |
|---|---------------------|---------|
| Appearance before local board, classification after | 625.2 (c) | 22a |
| Conscientious objectors, special provision | 627.25 | 22a |
| Decision, how reached | 627.26 | 24a |
| Decision of board of appeal, finality | 627.26 | 24a |
| Presidential | 628.1, 628.2, 628.7 | 24a-25a |
| Statement of person appealing | 627.12 | 22a |
| Stays induction, appeal to President | 628.7 | 25a |
| Who may appeal to President | 628.1, 628.2 | 24a-25a |

APPEARANCE BEFORE LOCAL BOARD:

| | | |
|------------------------------------|--------------|---------|
| Attorney, representation by | 625.2 (a) | 21a |
| Procedure | 625.1, 625.2 | 20a-21a |
| Questions that may be raised | 625.2 | 21a |
| Records | 625.1, 625.2 | 20a-21a |
| Right to appear in person | 625.1 (a) | 20a |

ARMED FORCES:

| | | |
|--|------------|----|
| Administration of selective service, duty status | 10 (a) (3) | 9a |
| Deferment in time of peace | 5 (b) | 3a |

| | | |
|---|-----------|-----|
| ATTORNEYS, local board appearance | 625.2 (a) | 21a |
|---|-----------|-----|

BOARDS OF APPEAL:

| | Section | |
|---------------------------------|--------------------|---------|
| Appointment | 603.22 | 13a |
| Area | 603.21 | 13a |
| Authority for, statutory | 10 (a) (2) | 8a |
| Composition and authority | 10 (a) (2), 603.22 | 8a, 13a |
| Jurisdiction | 603.24 | 14a |

Subject Index

| | PAGE |
|---|------------------------|
| CLASS I-A-O, definition | 622.12 16a |
| CLASS I-B, elimination of classification in | 622.13 16a |
| CLASS I-B-O, elimination of classification in | 622.14 17a |
| CLASS IV-D, definition | 622.44 17a |
| CLASS IV-D, statutory authority | 5 (d) 4a |
| CLASS IV-E, definition | 622.51 17a |
| CLASS IV-E, statutory authority | 5 (g) 6a |
| CLASS IV-F: | |
| Mentally unfit | 622.62 18a |
| Morally unfit | 622.61 18a |
| Physically unfit | 622.62 18a |
| Statutory authority | 5 (e) (1) 4a, 5a |
| CLASSIFICATION IN GENERAL: | |
| General principles | 623.1 19a |
| Physical examination, classification before, procedure | 623.21 19a |
| Time for | 623.1 (a) 19a |
| CONSCIENTIOUS OBJECTORS: | |
| Appeal, special provision | 627.25 22a |
| Assignees, period of service | 625.14 33a |
| Assignment to work | 652.1, 652.2 29a, 30a |
| Class I-A-O, definition | 622.12 16a |
| Class I-B-O, elimination of classification in | 622.14 17a |
| Class IV-E, definition | 622.51 17a |
| Delinquency | 652.11 31a-33a |
| Delivery of persons assigned to work | 652.11, 652.12 31a-33a |
| Local board jurisdiction after assignment to work | 652.13 33a |
| Mentally unfit, classification | 622.62 18a |
| Order to report for work | 652.11 31a |
| Period of service | 652.14 33a |
| Physical examination, final type | 651.8 29a |
| Statutory provisions | 5 (g) 6a-7a |
| Work under civilian direc- tion, discipline | 691.17 (d) (e) 34a |

Subject Index

| | PAGE |
|--|-----------------------------|
| CREED, discrimination in classification | 623.1 (c) 19a |
| DEFERMENT, termination when cause ceases | 5 (h) 7a |
| DELINQUENCY: | |
| Conscientious objectors | 652.11 31a |
| Definition | 601.5 11a |
| Disposition of delinquency cases | 642.3 28a |
| Investigation of | 642.2, 642.3 27a, 28a |
| Local board action after report to district attorney | 642.5 29a |
| Mailing notice of | 642.1 27a |
| Report to U. S. District Attorney | 642.4 28a |
| DELIVERY AND INDUCTION: | |
| Induction in general | 633.9 26a |
| Order to report for induction | 633.1 25a, 26a |
| DIRECTOR OF SELECTIVE SERVICE: | |
| Appointment, authority for | 10 (a) (3) 9a |
| Authority | 10 (a) (3), 603.1 9a, 12a |
| DIVINITY STUDENTS, classification | |
| | 622.44 17a |
| GOVERNORS, deferment | |
| | 5 (c) (1) 4a |
| INDUCTED MAN, definition | |
| | 601.7 12a |
| INDUCTION STATION, definition | |
| | 601.8 12a |
| JUDGES, deferment | |
| | 5 (c) (1) 4a |
| LEGISLATIVE OFFICERS, deferment | |
| | 5 (c) (1) 4a |
| LOCAL BOARDS: | |
| Appointment, authority for | 10 (a) (2) 8a |
| Appointment, qualifications | 603.52 14a |
| Area | 603.51 14a |
| Authority | 10 (a) (2) 8a |
| Composition | 603.52, 10 (a) (2), 8a, 14a |
| Jurisdiction | 603.54 15a |
| MENTALLY UNFIT, classification | |
| | 622.62 18a |

Subject Index

| | PAGE |
|---|-----------------------------------|
| MINISTERS OF RELIGION: | |
| Catholic Lay Brothers Note 22, 622.44 | 34a-35a |
| Classification | 622.44 17a |
| Definition | 622.44 17a |
| Exemption from training and service | 5 (d) 4a |
| Jehovah's witnesses Note 24, 622.44 | 35a-36a |
| OFFICIALS, necessary men, deferment | 5 (c) (2) 4a |
| PENALTIES, violation of Act or Regulations | 11 10a-11a |
| PHYSICAL EXAMINATION, classification | |
| before, procedure | 623.21 19a |
| POSTPONEMENT OF INDUCTION | 633.1 25a-26a |
| PRESIDENT, authority under Act | 10 8a-10a |
| REGISTRATION: | |
| Exception from, termination when cause | |
| ceases | 5 (h) 7a |
| Liability for | 2 1a |
| Penalties for failure | 11, 611.5 (e) 10a-11a, 15a-16a |
| Who must register | 2 1a |
| REGULATIONS AUTHORIZED..... | 10 (a) (1) 8a |
| RELIGIOUS ORGANIZATIONS, membership, | |
| discrimination | 623.1 (e) 19a |
| RESPONSIBILITY for performance of duty | 611.5 (e) 15a-16a |
| SELECTIVE SERVICE LAW, penalty for | |
| violation of | 11 10a-11a |
| SELECTIVE SERVICE SYSTEM: | |
| Administration: | |
| Boards of Appeal 10 (a) (2), 603.21, 603.22, 603.24 | 8a, 13a-14a |
| Local Boards 10 (a) (2), 603.51, 603.52, 603.54 | 8a, 14a-15a |
| National | 10 (a) (3), 603.1 9a, 12a |
| State | 603.11, 603.12 13a |
| Authority for organization | 10 8a-10a |

Subject Index

| | | PAGE |
|---|-----------|-------|
| STATE HEADQUARTERS: | | |
| Directors, state, appointment and authority | 603.12 | 13a |
| Functions in general | 603.11 | 13a |
| STATE OFFICERS, necessary men, deferment | 5 (c) (2) | 4a |
| STATE OFFICIALS, elective, deferment | 5 (c) (1) | 4a |
| STAY OF INDUCTION; appeal to President | 628.7 | 25a |
| STUDENTS, deferment | 5 (f) | 6a |
| THEOLOGICAL STUDENTS: | | |
| Classification | 622.44 | 17a |
| Exemption from training and service | 5 (d) | 4a |
| TRAINING AND SERVICE: | | |
| Acceptability to armed forces | 3 (a) | 1a-2a |
| Liability for | 3 (a) | 1a-2a |
| VICE-PRESIDENT, deferment | 5 (c) (1) | 4a |

MISCELLANEOUS

CATHOLIC LAY BROTHERS:

| | | |
|---|-------|---------|
| Exemption, authority for | 5 (d) | 43a-46a |
| Opinion No. 2, National Headquarters, Selective Service System | | 43a-46a |

JEHOVAH'S WITNESSES:

| | | |
|---|--|---------|
| Ministerial status of: | | |
| Opinion No. 14 (Vol. III), National Headquarters, Selective Service System | | 36a-39a |
| Opinion No. 14 (Vol. III), <i>Amended</i> , National Headquarters | | 40a-43a |

KENNEDY, Congressman Martin J., letter dated August 7, 1940, to Military Affairs Committee, House of Representatives, as to *Total exemption* of ordained clergymen, of seminarians, and of Brothers

47a-51a

Subject Index

OPINIONS of National Headquarters, Selective
Service System:

PAGE

No. 2, January 25, 1941, as to classifica-
tion and exemption of *Catholic Lay
Brothers*

43a-46a

No. 14, June 12, 1941, as to ministerial
status of *Jehovah's witnesses*

36a-39a

No. 14 (Amended), Nov. 2, 1942, as to
ministerial status of *Jehovah's witnesses*

40a-43a

APPENDIX

THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED

Sec. 2. Registration in general.

Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

Sec. 3. Training and service in general.

(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further*, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval

forces. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: *Provided*, That within the limits of the quota determined under section 4 (b) for the subdivision in which he resides, any person, regardless of race or color, between the ages of eighteen and forty-five, shall be afforded an opportunity to volunteer for induction into the land or naval forces of the United States for the training and service prescribed in subsection (b), but no person who so volunteers shall be inducted for such training and service so long as he is deferred after classification: *Provided further*, That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: *Provided further*, That no men shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations, for such men, as may be determined by the Secretary of War or the Secretary of the Navy, as the case may be, to be essential to public and personal health: *Provided further*, That except in time of war there shall not be in active training or service in the land forces of the United States at any one time under subsection (b) more than nine hundred thousand men inducted under the provisions of this Act. The men inducted into the land or naval forces for training and service under this Act shall be assigned to camps or units of such forces: *Provided further*, That no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth.

Sec. 5. Persons not required to register; Deferment, exemption, and relief from training and service.

(b) In time of peace, the following persons shall be relieved from liability for training and service under section 3 (b) and from the liability to serve in any reserve component of the land or naval forces imposed by this Act:

[(b)] (2) Any person who as a member of the active National Guard shall have satisfactorily served as an officer or enlisted man for at least one year in active Federal service in the Army of the United States, and subsequent thereto for at least two consecutive years in the Regular Army or in the active National Guard, before or after or partially before and partially after the time fixed for registration under section 2; or any person who as a member of the Naval Reserve or Marine Corps Reserve shall have satisfactorily served for at least three consecutive years on active duty before or after or partially before and partially after the time fixed for such registration; or any person who as a member of the Naval Reserve or Marine Corps Reserve shall have satisfactorily served for at least one year on active duty and for at least two consecutive years in the Regular Navy or Marine Corps or with an organized unit of the Naval Reserve or Marine Corps Reserve, before or after or partially before and partially after the time fixed for such registration.

[(b)] (3) Any person who as an officer or enlisted man in the active National Guard at the time fixed for registration under section 2, and who shall have satisfactorily served therein for at least six consecutive years, before or after or partially before and partially after the time fixed for such registration.

[(b)] (4) Any person who is an officer in the Officers' Reserve Corps on the eligible list at the time fixed for registration under section 2, and who shall have satisfactorily

served therein on the eligible list for at least six consecutive years, before or after or partially before and partially after the time fixed for such registration.

. . .

[5.] (c) (1) The Vice President of the United States, the Governors, and all other State officials chosen by the voters of the entire State, of the several States and Territories, members of the legislative bodies of the United States and of the several States and Territories, judges of the courts of record of the United States and of the several States and Territories and the District of Columbia, shall, while holding such offices, be deferred from training and service under this Act in the land and naval forces of the United States.

(2) The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service under this Act in the land and naval forces of the United States, of any person holding an office (other than an office described in paragraph (1) of this subsection) under the United States or any State, Territory, or the District of Columbia, whose continued service in such office is found in accordance with section 10 (a) (2) to be necessary to the maintenance of the public health, safety, or interest.

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

(e) (1) The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service under this Act in the land and naval forces of the United States of any or all categories of those men whose employment in industry,

agriculture, or other occupations or employment, or whose activity in other endeavors, is found in accordance with section 10 (a) (2) to be necessary to the maintenance of the national health, safety, or interest. The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service under this Act in the land and naval forces of the United States (1) of any or all categories of those men in a status with respect to persons dependent upon them for support which renders their deferment advisable; and (2) of any or all categories of those men found to be physically, mentally, or morally deficient or defective. For the purpose of determining whether or not the deferment of men is advisable because of their status with respect to persons dependent upon them for support, any payments of allowances which are payable by the United States to the dependents of persons serving in the land or naval forces of the United States shall be taken into consideration but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents. The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service under this Act in the land and naval forces of the United States of any or all categories of those men who have wives or children, or wives and children, with whom they maintain a bona fide family relationship in their homes. No deferment from such training and service shall be made in the case of any individual except upon the basis of the status of such individual, and no such deferment shall be made of individuals by occupational groups or of groups of individuals in any plant or institution. Rules and regulations issued pursuant to this subsection shall include pro-

visions requiring that there be posted in a conspicuous place at the office of each local board a list setting forth the names and classifications of those men who have been classified by such local board.

(2) Anything in this Act to the contrary notwithstanding, the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment, by age group or groups, from training and service under this Act in the land and naval forces of the United States, of those men whose age or ages are such that he finds their deferment to be advisable in the national interest: *Provided*, That the President may, upon finding that it is in the national interest, terminate the deferment by age group or groups of any or all of the men so deferred.

(f) Any person eighteen or nineteen years of age who, while pursuing a course of instruction at a high school or similar institution of learning, is ordered to report for induction under this Act during the last half of the academic year at such school or institution, shall, upon his request, have his induction under this Act postponed until the end of such academic year.

(g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induc-

tion, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

(h) No exception from registration, or exemption or deferment from training and service, under this Act, shall continue after the cause therefor ceases to exist.

. . .

Sec. 10. Rules and regulations; Selective Service System.

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. No person who is an officer, member, agent, or em-

employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee;

(3) to appoint by and with the advice and consent of the Senate, and fix the compensation at a rate not in excess of \$10,000 per annum, of a Director of Selective Service who shall be directly responsible to him and to appoint and fix the compensation of such other officers, agents, and employees as he may deem necessary to carry out the provisions of this Act: *Provided*, That any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve component thereof or any officer or employee of any department or agency of the United States who may be assigned or detailed to any office or position to carry out the provisions of this Act (except to offices or positions on local boards, appeal boards, or agencies of appeal established or created pursuant to section 10 (a) (2) may serve in and perform the functions of such office or position without loss of or prejudice to his status as such officer in the Army, Navy, Marine Corps, or Coast Guard or reserve component thereof, or as such officer or employee in any department or agency of the United States: *Provided further*, That any person so appointed, assigned, or detailed to a position the compensation in respect of which is at a rate in excess of \$5,000 per annum shall be appointed, assigned or detailed by and with the advice and consent of the Senate: *Provided further*, That the President may appoint necessary clerical and stenographic employees for local boards and fix their compensation without regard to the Classification Act of 1923, as amended, and without regard to the provisions of civil-service laws;

(4) to utilize the services of any or all departments and any and all officers or agents of the United States and to accept the services of all officers and agents of the several States, Territories, and the District of Columbia and sub-

divisions thereof in the execution of this Act; and

(5) to purchase such printing, binding, and blankbook work from public, commercial, or private printing establishments or binderies upon orders placed by the Public Printer or upon waivers issued in accordance with section 12 of the Printing Act approved January 12, 1895, as amended by the Act of July 8, 1935 (49 Stat. 475), and to obtain by purchase, loan, or gift such equipment and supplies for the Selective Service System as he may deem necessary to carry out the provisions of this Act, with or without advertising or formal contract; and

(6) to prescribe eligibility, rules, and regulations governing the parole for service in the land or naval forces, or for any other special service established pursuant to this Act, of any person convicted of a violation of any of the provisions of this Act.

. . .

Sec. 11. Penalties.

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration

or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act *unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. [Italics added]*

SELECTIVE SERVICE REGULATIONS SECOND EDITION

601.5 *Delinquent.* A "delinquent" is (1) any man required under the selective service law and directions given pursuant thereto to present himself for and submit to registration on a certain day fixed by the President who fails to so present himself for and submit to registration on that day and has no valid reason for having failed to perform that duty; or (2) any registrant who, prior to his induction into the military service, fails to perform, at the required time or within the allowed period of given time, any duty imposed upon him by the selective service law and directions

given pursuant thereto and has no valid reason for having failed to perform that duty.

601.7 *Inducted man.* An "inducted man" is a man who has become a member of the land or naval forces through the operation of the Selective Service System.

601.8 *Induction station.* The term "induction station" refers to any camp, post, ship, or station at which selected men are received by the military authorities and, if found acceptable, are inducted into military service.

NATIONAL ADMINISTRATION

603.1 *Director of Selective Service.* The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the selective service law and is hereby authorized and directed:

- (1) To prescribe such amendments to these regulations as he shall deem necessary.
- (2) To issue such public notices, orders, and instructions as shall be necessary to the efficient administration of the selective service law.
- (3) To obligate funds appropriated for the administration of the selective service law.
- (4) To appoint such officers, employees, assistants, and deputies whose salary is \$5,000 per annum or less, as shall be necessary to the efficient administration of the selective service law.
- (5) To perform such other duties as shall be required of him under the selective service law.
- (6) To delegate any of his functions and powers to such officers, agents, or persons as he may designate.

STATE ADMINISTRATION

603.11 *Governor.* The Governor of each State shall have charge of the administration of the selective service law in his State. The office by means of which he performs his selective service functions shall be called "State Headquarters for Selective Service." State Headquarters for Selective Service shall be an office of record for selective service operations only; all selective service records and no other records shall be maintained in this office. For the operation of State Headquarters for Selective Service any necessary expense, including the hire of clerical personnel, shall be paid for by the Federal Government as provided in these regulations.

603.12 *State Director of Selective Service.* The Governor of each State is authorized to recommend for appointment an official to whom he may delegate his administrative functions relating to selective service. This official, if so recommended and appointed, shall be called the "State Director of Selective Service" and shall be in immediate charge of State Headquarters for Selective Service.

BOARDS OF APPEAL

603.21 *Area.* Each State Director of Selective Service shall establish one or more board of appeal areas in his State. Each such area shall include whole local board areas and, unless a larger number is authorized by the Director of Selective Service, should have not more than 70,000 registrants as a result of the first registration.

603.22 *Composition and appointment.* For each board of appeal area, a board of appeal, normally of five members, shall be appointed by the President, upon recommendation of the Governor. The members shall be male citizens of the United States who are not members of the land or naval forces; they shall be residents of the area for which their board is appointed; and they should be at least 38 years old. The board of appeal should be a composite board,

representative of all activities of its district, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture. If the number of appeals sent to one board becomes too great for the board to handle without undue delay, additional groups of five members similarly constituted shall be appointed to the board by the President, upon recommendation of the Governor. Each such group shall have full authority to act for the board on all cases assigned to it by the board. Each group shall act separately. An additional member, who shall supervise and coordinate the work of all the groups of a board of appeal, shall be appointed by the President, upon recommendation of the Governor.

603.24 *Jurisdiction.* Each board of appeal shall have jurisdiction to review and to affirm or change any decision appealed to it from any local board in its area or any decision appealed from any local board not in its area when transferred to it in the manner provided in these regulations.

LOCAL BOARDS

603.51 *Area.* Each State shall be divided into local board areas by the Governor. Each area should have a population of about 30,000. There shall be at least one separate local board area in each county.

603.52 *Composition and appointment.* For each local board area, a local board of three or more members shall be appointed by the President, upon recommendation of the Governor. The members shall be male citizens of the United States who are not members of the land or naval forces; they preferably should be residents of the area for which their board is appointed, and in any event, shall be residents of the county in which their local board has jurisdiction; and they should be at least 38 years old.

603.54 *Jurisdiction.* The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed and to all persons whose Registration Cards (Form 1) are duly transferred to it. It shall have full authority to do and perform all acts authorized by the selective service law.

IN GENERAL

611.5 *Responsibility for performance of duty. . . .*

(e) The Selective Training and Service Act of 1940, as amended, section 11, provides that "any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making of, any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons

who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act."

AVAILABLE FOR OR IN MILITARY SERVICE

622.12 *Class I-A-O: Available for noncombatant military service; conscientious objector.* In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to combatant military service in which he might be ordered to take human life, but not conscientiously opposed to noncombatant military service in which he could contribute to the health, comfort and preservation of others.

622.13 *Class I-B: Formerly available for limited military service.* No registrant shall hereafter be placed in Class I-B, and all registrants now in Class I-B shall be reclassified at the time and in the manner specified by the Director of Selective Service.

622.14 *Class I-B-O: Formerly available for noncombatant limited military service.* No registrant shall hereafter be placed in Class I-B-O, and all registrants now in Class I-B-O shall be reclassified at the time and in the manner specified by the Director of Selective Service.

622.44 *Class IV-D: Minister of religion or divinity student.* (a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

AVAILABLE FOR WORK OF NATIONAL IMPORTANCE UNDER CIVILIAN DIRECTION

622.51 *Class IV-E: Available for work of national importance; conscientious objector.* (a) In Class IV-E shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

(b) Upon being advised by the Director of Selective Service that a registrant who was inducted into the land or naval forces for military service will be discharged because of conscientious objections which make him unadaptable to military service, the local board shall change such registrant's classification and place him in Class IV-E. The Director of Selective Service shall assign such registrant to work of national importance under civilian direction.

. . .

DEFERRED BY REASON OF BEING UNFIT

622.61 *Class IV-F: Morally unfit.* In Class IV-F shall be placed every registrant who, under procedure and standards prescribed by the land and naval forces, is found to be morally unacceptable for training and service or, under procedures and standards prescribed by the Director of Selective Service, is found to be morally unacceptable for assignment to work of national importance. The Director of Selective Service will keep the various elements of the Selective Service System advised of such procedures and standards.

622.62 *Class IV-F: Physically or mentally unfit.* In Class IV-F shall be placed any registrant who:

(1) After physical examination by the examining physician is found to have a defect set forth in the List of Defects (Form 220);

(2) After physical examination by the armed forces is found to be physically or mentally unfit for any military service; or

(3) Is a conscientious objector to both combatant and noncombatant military service found, after physical examination (final type), to be physically or mentally unfit for work of national importance under civilian direction.

. . .

COMMENCEMENT OF CLASSIFICATION

623.1 *General principles of classification.* . . .

(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

623.2 *Information considered for classification.* . . . [See Footnote 182, page 100 of Petitioner's Brief in this cause, for entire text of this section.]

CLASSIFICATION BEFORE PHYSICAL EXAMINATION

623.21 *Consideration of classes not requiring physical examination.* (a) Upon undertaking to classify any registrant, it should first be determined whether he should be classified in Class I-C. If the registrant is not classified in Class I-C, it should next be determined whether he should be classified in Class IV-A.

(b) If the registrant is not classified in Class I-C or Class IV-A under paragraph (a) of this section, the local board shall next determine whether he should be classified in IV-C on the ground that he is a neutral alien who has filed DSS Form 301 or on the ground that there is no possibility of his being accepted for training and service because of his nationality or ancestry. Otherwise no consideration will be given to Class IV-C at this time.

(c) If the registrant is not classified in Class I-C or Class IV-A under paragraph (a) of this section and is not classified in Class IV-C under paragraph (b) of this section, consideration shall next be given to the following classes in the order listed, and the registrant shall be classified in the first class for which grounds are established:

Class IV-D

Class IV-B

Class III-C

Class III-A

Class II-C

Class II-B

Class II-A

PART 625—APPEARANCE BEFORE LOCAL BOARD

625.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances,

no other record of the disposition of the registrant's request need be made.

625.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

• • •

PROCEDURE FOR TAKING APPEAL

• • •

627.12 *Statement of person appealing.* The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

• • •

627.25 *Special provisions where appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal shall first determine whether the registrant should be classified in one of the classes set forth in section 623.21, in the order set forth, and if it so determines, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the United States district attorney for the

judicial district in which the local board of the registrant is located for the purpose of securing an advisory recommendation of the Department of Justice, provided that in a case in which the local board has classified the registrant in Class IV-E or in a case in which the registrant has ~~claimed objection to combatant service only and the local board has classified him in Class I-A-O~~, the board of appeal may affirm the classification of the local board without referring the case to the Department of Justice. No registrant's file shall be forwarded to the United States district attorney by any board of appeal and any file so forwarded shall be returned, unless in the "Minutes of Other Actions" on the Selective Service Questionnaire (Form 40) the record shows and the letter of transmittal states that the board of appeal reviewed the file and determined that the registrant should not be classified in one of the classes set forth in section 623.21.

(b) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal (1) that if the registrant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the board of appeal shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice.

627.26 *Decision of board of appeal.* (a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant. (See part 623.)

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

628.1 *Who may appeal to the President from any determination of a board of appeal.* (a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

(b) An appeal to the President may be taken by the Director of Selective Service (1) by mailing to the local board, through the State Director of Selective Service, a written notice of appeal or (2) by placing in the registrant's file a written notice of appeal and, through the State Director of Selective Service, advising the local board thereof.

(c) An appeal to the President may be taken by the State Director of Selective Service (1) by mailing to the local board a written notice of appeal and directing the local board to forward the registrant's file to him for transmittal to the Director of Selective Service or (2) by placing in the registrant's file a written notice of appeal and advising the local board thereof. Before he forwards the registrant's file to the Director of Selective Service, the State Director of Selective Service shall place in such file a written statement of his reasons for taking such appeal.

• • •

628.2 *Appeal to the President.* The registrant or any person who claims to be a dependent of the registrant or any person who has filed written information as to the occupational status of the registrant, at any time within 10 days after the mailing by the local board of the Notice of Classification (Form 57), notifying the registrant that the local board classification has been affirmed or changed, may appeal to the President provided the registrant was classified by the board of appeal in either Class I-A, Class I-A-O, or Class IV-E and one or more members of the board of appeal dissented from such classification. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 10-day period herein provided for such an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board permits such an appeal, the right of such persons to appeal to the President shall terminate at the end of the 10-day period herein provided. [Italics added]

• • •

628.7 *Appeal to the President stays induction.* (a) When a registrant is classified by the board of appeal and one or more members of the board of appeal dissent from such classification, the registrant shall not be inducted during the period afforded him to take an appeal to the President.

• • •

GENERAL

633.1 *Order to Report for Induction (Form 150).* (a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in duplicate. The local board shall mail the original to the registrant and shall file the copy in his Cover Sheet (Form 53).

(b) The time specified for reporting shall be at least 10 days after the date the order is mailed; provided, however, in case of death or extreme emergency to a person in the registrant's immediate family, serious illness of registrant, or other extreme emergency beyond the registrant's control, the local board may, after the Order to Report for Induction (Form 150) has been issued, postpone the time when such registrant shall so report for a period not to exceed 60 days from the date of such postponement; subject, however, in cases of imperative necessity, to one further postponement for a period not to exceed 60 days; and provided also that the Director of Selective Service or any State Director of Selective Service (as to registrants within his State) may for good cause at any time prior to the issuance of an Order to Report for Induction (Form 150) order a local board to delay the issuance of such order until such time as he may deem advisable, or the Director of Selective Service or any State Director of Selective Service (as to registrants within his State) may for good cause at any time after the issuance of an Order to Report for Induction (Form 150) order a local board to postpone the induction of a registrant until such time as he may deem advisable, and registrant shall be inducted into the land or naval forces during the period of any of such delays or postponements.

(c) The date of issuance and the date of expiration of any period of delay or postponement authorized in (b) above shall be noted in the "Remarks" column of the Classification Record (Form 100).

(d) Any period of delay or postponement may be terminated before the date of expiration when the issuing authority so directs.

. . .

633.9 *Induction.* At the induction station, the selected men found acceptable will be inducted into the land or naval forces.

. . .

642.1 *Mailing notice of delinquency.* (a) When a local board has reason to believe that a nonregistrant under its jurisdiction is a delinquent or that a registrant under its jurisdiction has become a delinquent, the board shall prepare, in quadruplicate, a Notice of Delinquency (Form 281).

(b) The local board shall mail the original of the Notice of Delinquency (Form 281) to the suspected delinquent at his last-known address. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall file the fourth copy with the date of mailing noted thereon.

(c) If the suspected delinquent is a registrant under the jurisdiction of the local board, the local board shall note in the "Remarks" column of the Classification Record (Form 100) the fact that the notice was mailed and file the fourth copy of the Notice of Delinquency (Form 281) in the registrant's Cover Sheet (Form 53).

642.2 *Investigation of delinquency.* (a) After mailing the Notice of Delinquency (Form 281), the local board shall wait 5 days before taking further action.

(b) If it does not hear from the suspected delinquent during the 5-day period, the local board shall take the following steps:

(1) Communicate with the person "who will always know" the registrant's address whose name and address appear on the Registration Card (Form 1).

(2) Communicate with the "employer" whose name and address appear on the Registration Card (Form 1).

(c) If as a result of these contacts the local board acquires any information which will enable it, with a reasonable amount of effort, to locate the suspected delinquent, it should make that effort.

(d) In trying to locate the suspected delinquent the local board may use the voluntary assistance of local or State

police officials, as well as the press and radio. In no event, however, will the local board order or participate in the arrest of a suspected delinquent.

642.3 *Disposition of delinquencies.* If a suspected delinquent has been located as a result of the local board's efforts under section 642.2 or a suspected delinquent has reported voluntarily to a local board, the local board shall carefully investigate the delinquency. If the board finds that the suspected delinquent is innocent of any wrong intent, the local board shall proceed to consider his case just as if he were never suspected of being a delinquent. The local board shall report its decision to the State Director of Selective Service and shall note its decision in its records.

642.4 *Reporting delinquents to United States district attorney.* (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (see sec. 642.2), the local board shall report him to a United States district attorney for prosecution under section 11 of the Selective Training and Service Act of 1940, as amended.

(b) In reporting a delinquent to a United States district attorney, the local board shall fill out a Report of Delinquents to United States District Attorney (Form 279), in quadruplicate. The local board shall mail the original to the United States district attorney. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall note the date of mailing on the fourth copy and shall place it in the registrant's Cover Sheet (Form 53), if the delinquent is a registrant, or in an alphabetical file of nonregistrant delinquents, if the delinquent is not a registrant.

(c) If the delinquent is a registrant, the local board shall note its action in the "Remarks" column of the Classification Record (Form 100).

642.5 *Local board action subsequent to reporting a delinquent to United States district attorney.* When a delinquent who has been reported to a United States district attorney later offers to comply with the law, the United States district attorney should be immediately notified and given a complete statement of the facts concerning such offer of compliance. The decision of whether such a delinquent should be prosecuted or his prosecution continued, in case it has already been undertaken, rests entirely with the United States district attorney. The local board, when requested to do so by the United States district attorney, may offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is willing to comply with the law. If it is determined that the delinquency is not willful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped.

. . .

651.8 *Final-type physical examination at induction station.* At the induction station, Class IV-E registrants will be given a final-type physical examination in the same manner as that conducted for selected men. Upon completion of the final-type physical examination, Class IV-E registrants will return to their local board under direction of their leader.

. . .

ASSIGNMENT TO WORK OF NATIONAL IMPORTANCE

652.1 *Report of conscientious objector to Director of Selective Service.* (a) When a registrant in Class IV-E has been found to be acceptable for work of national im-

portance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction.

(b) Four copies of the Conscientious Objector Report (Form 48) shall be filled out and signed by a member of the local board. Under "Remarks" the local board should add any additional information that might aid in the proper assignment of the registrant. The original and two copies of the Conscientious Objector Report (Form 48) shall be mailed to the State Director of Selective Service and the remaining copy retained in the registrant's Cover Sheet (Form 53). The State Director of Selective Service shall immediately transmit the original and one copy of the Conscientious Objector Report (Form 48) to the Director of Selective Service and shall file the remaining copy.

(c) Until such time as his defects have been corrected, no Conscientious Objector Report (Form 48) shall be filled out or used for a registrant who, according to the report of the examining physician, will be qualified for general service after satisfactory correction of specified remediable defects.

652.2 *Assignment by Director of Selective Service.*

(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall forward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local

board other than the registrant's local board, the registrant's local board will be notified of such action so that appropriate notations may be made in its records.

(b) Persons paroled for assignment to work of national importance under civilian direction or other special service under part 643 shall be assigned to such work by the Director of Selective Service in such manner as he may determine.

DELIVERY OF PERSONS WHO HAVE BEEN ASSIGNED TO WORK OF NATIONAL IMPORTANCE UNDER CIVILIAN DIRECTION

652.11 *Preparation and distribution of Order to Report; delinquency of IV-E registrants.* (a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV-E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Armed Forces' Original, the Surgeon General's Copy, and the National Headquarters' Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Local Board's Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service: Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of

the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

(b) The issuance of an Order to Report for Work of National Importance (Form 50) may be delayed or delivery under such an order may be postponed to the extent and in the manner provided in section 633.1.

(c) If for any reason an Order to Report for Work of National Importance (Form 50) is not sent to a registrant for whom an Assignment to Work of National Importance (Form 49) has been received from the Director of Selective Service, or in the event a registrant who has been sent an Order to Report for Work of National Importance (Form 50) does not report to the local board pursuant to such order, the local board shall report such fact to the Director of Selective Service through the State Director of Selective Service. If any such registrant becomes delinquent by reason of his failure to perform any of his obligations under the selective service law, his case should be handled under the provisions of part 642 in the same manner as in the case of any other delinquent registrant.

652.12 *Transportation to camp.* (a) When a registrant in Class IV-E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form

No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian direction as is followed in the case of a registrant delivered for induction into the land or naval forces.

(b) The delivery of a person paroled to work of national importance under civilian direction will be accomplished by the proper prison officials.

652.13 *Jurisdiction of local board while registrant is engaged in work of national importance.* A registrant in Class IV-E who has reported for work of national importance pursuant to this part shall be retained in Class IV-E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status.

652.14 *Period of service.* (a) A registrant in Class IV-E who has been assigned to a camp shall be engaged in work of national importance under civilian direction during the existence of any war in which the United States is engaged and during the 6 months immediately following the termination of any such war, unless sooner released under the same conditions as pertain in the armed forces.

(b) A person assigned to a camp on parole pursuant to part 643 shall be engaged in work of national importance under civilian direction for the length of the term of his sentence less deductions for good conducts as provided in part 643.

PART 691—RULES FOR CAMPS OPERATED BY THE NATIONAL SERVICE BOARD FOR RELIGIOUS OBJECTORS

691.17 Discipline. . . .

(d) If, after reporting to the camp, an assignee is absent without leave for a continuous period of 10 days, he will be deemed a deserter. On the 11th day the Director of Selective Service will be notified through regular channels and may take the necessary steps to report the assignee to the proper United States attorney as a violator of the Selective Training and Service Act of 1940, as amended.

(e) Refusal to work or perform other assigned duties, inciting others to refuse to work or perform assigned duties, or failure to abide by the rules and regulations promulgated by the camp director, will constitute a violation of these rules and regulations.

A full and immediate report of such violation of these rules and regulations will be made to the Director of Selective Service through regular channels. If the reported conduct indicates that the assignee may have been improperly classified, the Director of Selective Service may take the necessary steps to submit the information to the assignee's local board with a request that the assignee's case be reopened and his classification considered anew under the Selective Service Regulations. The Director of Selective Service may also report the assignee to the proper United States attorney as a violator of the Selective Training and Service Act of 1940, as amended.

NOTES—PART 622

Class IV-D.

22. *Catholic Lay Brothers.* Lay Brothers of the duly established and recognized orders of the Holy Roman Catholic Church are not "duly ordained ministers of reli-

gion" but should be classified in Class IV-D as "regular ministers of religion."

24. *Jehovah's Witnesses.* The unincorporated body of persons known as Jehovah's Witnesses are considered to constitute a recognized religious sect. Members of Jehovah's Witnesses constituting the Bethel family and the office and factory workers at 117 Adams Street, Brooklyn, New York, whose names are recorded in the executive offices of the Watchtower Bible and Tract Society, Inc. and who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, may be classified in Class IV-D, provided their names appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System. Members of Jehovah's Witnesses who devote all or a substantial part of their time to the work of teaching the tenets of their religion and in the converting of others to their belief, and are individually recorded as "pioneers" by the Watchtower Bible and Tract Society, Inc. at its executive offices in Brooklyn, New York, may also be classified in Class IV-D, provided that their names appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System. Whether a IV-D-classification may be given to members of Jehovah's Witnesses who occupy the capacities and are known as regional servants, zone servants, company servants, sound servants, advertising servants, back-call servants, and by other similar descriptive titles, must be determined in each individual case by the local board based upon whether such persons devote their lives to the furtherance of the beliefs of Jehovah's Witnesses, whether they perform functions which are normally performed by regular or duly ordained ministers of other religions, and whether they are regarded by other Jehovah's Witnesses in the same manner as other duly

ordained ministers of other religions are ordinarily regarded. In the case of Jehovah's Witnesses as in the case of all other registrants who claim exemption as duly ordained ministers of religion, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

• • •

VOL. III OPINION NO. 14
NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

SUBJECT: Ministerial status of Jehovah's Witnesses
Facts:

Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained ministers of religion under Section 5 (d), Selective Training and Service Act of 1940 and Paragraph 360, Selective Service Regulations which read as follows:
 Section 5 (d):

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Paragraph 360:

"Class IV-D: Minister of religion or divinity student.—a. In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in theological or divinity school recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

b. A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization

of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

c. A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question.—May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer:

1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah's Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, places them in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers of other religions.

3. There are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the reli-

gious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and of the Bethel family, which includes workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. The names of those who form this group are recorded in the executive offices of the Watchtower Bible and Tract Society, Inc. Members of this group who devote their entire time and effort to the publications and supplies of the Society have a standing in relationship to that organization and the other members of Jehovah's Witnesses which brings them within the purview of Section 5 (d) of the Selective Training and Service Act of 1940 and they may be classified in Class IV-D (providing their names appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.

4. The members of Jehovah's Witnesses who devote their time to the work of teaching the tenets of their religion and in the converting of others to their belief, and who enjoy the esteem of other Jehovah's Witnesses, and are each individually recorded as "pioneers" by the Watchtower Bible and Tract Society, Inc., at its executive offices in Brooklyn, New York, are in a position where they may be recognized as having a standing, in relationship to the organization and to the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers in other religions, and such persons who spend all or a substantial part of their time in the work of Jehovah's Witnesses, as set forth above, come within the purview of Section 5 (d) of the Selective Training and Service Act of 1940 and may be classified in Class IV-D, provided that the names of such persons appear on the certified official

list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.

5. The members of Jehovah's Witnesses who occupy the capacities are known by the various names of regional servants, zone servants, company servants, sound servants, advertising servants, back-call servants, and by other similar descriptive titles, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

LEWIS B. HERSHEY

Deputy Director

Legal

June 12, 1941

File Reference III—Ministers
Sec. 5 (d); Par. 360, S.S.R.

VOL. III OPINION NO. 14 (AMENDED)
NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

SUBJECT: Ministerial Status of Jehovah's Witnesses

FACTS:

Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5 (d):

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 622.44:

"Class IV-D: Minister of religion or divinity student.

(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and

to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question.—May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer:

1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah's Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consist of the

office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in the converting of others to their belief. A certified official list of members of the Bethel Family and pioneers is being transmitted to the State Directors of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The members of the Bethel Family and pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV-D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions

which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

LEWIS B. HERSHEY
Director

LBH/spd

Legal

November 2, 1942

Secs. 5(d), 622.44

DISTRIBUTION "A,B,C,D"

OPINION NO. 2
NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

SUBJECT: Classification—Exemption of Catholic Lay Brothers on Account of Being Regular Ministers of Religion

Facts:

(1) Section 5 (d) of the Selective Training and Service Act reads as follows:

"(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

(2) Paragraph 360 of the Selective Service Regulations, which was promulgated in virtue of the foregoing provision of the Act, reads as follows:

"360. Class IV-D: Minister of religion or divinity student.—a. In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"b. A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"c. A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and customarily performs those duties."

(3) Archbishop Edward Mooney of Detroit, under date of December 14, 1940, as chairman of the Administrative Board of the National Catholic Welfare Conference, has officially certified to the Director of Selective Service the following facts in regard to the religious status of Catholic Lay Brothers:

"I beg to certify that according to the laws of the Church, the term 'Brother' or 'Lay Brother' signifies a regular minister of religion.

"'Lay Brothers' in all the canonically approved societies, orders and congregations are religious ministers in the fullest sense of that term as defined in the Code of Canon Law (Canon 488, 70). They are deliberately received into an ecclesiastically approved religious order or society so that, in fulfillment of their dedication by the profession of the vows or solemn promises of religion, they, as real ministers of religion, may cooperate in the sacred ministry

of the priests and the salvation of souls, by the performance of the special tasks assigned to them in schools, hospitals, religious institutes, houses of study or elsewhere.

"The 'Lay Brothers', so-called, are not only bound to the obligations of the clerical state (Cfr. Canons 592 and 679) but they also enjoy the very same privileges as clerics (Cfr. Canons 614 and 680)."

Question.—Are the Lay Brothers of the various Catholic religious orders entitled to be placed in Class IV-D?

Answer.—While it appears that all of these men have made profession of the vows required of them by their respective religious Congregations, such as poverty, chastity, obedience, et cetera, and are said to devote all of their time to their Congregations without pay; nevertheless, they are not "duly ordained ministers of religion" as that term has been defined in Paragraph 360c. Rather the claim is made in their behalf that they are "regular ministers of religion," within the meaning and limitations of Paragraph 360b.

From a legal standpoint, when construing Section 5 (d) of the Act and Paragraph 360b of the Regulations, if there is any ambiguity or doubt (and there seems to be some) in the matter, the intention of Congress, if it is apparent, may be considered in arriving at a solution of the question.

The status of the Lay Brothers was discussed in the meetings of the Committees on Military Affairs of both Houses of Congress when the Selective Training and Service Act was being heard and considered by such committees. And in the report of Chairman May of the House Committee on Military Affairs (on page 5 thereof) appears the following paragraph:

"Under section 5 (d), regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools, recognized as such for more than 1 year prior to the date of enactment of the bill, are to be exempt from training and service (but not

from registration) under the bill. *This exemption would also include all Brothers who have taken solemn vows to dedicate their lives to the service of God.*"

Moreover, when the Act was being debated in the Senate, Senator Lodge asked Senator Guffey (who was sponsoring the particular matter) if the language was broad enough to "cover religious brothers," and the answer was "yes." See page 16165 of the Congressional Record.

Therefore, unquestionably, it is clear that The Congress intended that the Lay Brothers were included in the purview of the Statutory exemption of regular ministers of religion from training and service.

Of course, in the last analysis, it is the function of the local selective service board to receive the facts in each case and make the proper classification decision; however, when the facts are established to the satisfaction of the local board that a registrant is a Lay Brother member of one of the duly established and recognized religious Congregations or Orders of the Holy Roman Catholic Church, we are of the opinion that the board should place such a person in Class IV-D, under authority of Paragraph 360b.

Nothing said in this opinion shall preclude such a Lay Brother from waiving and not insisting upon his status as a regular minister of religion and the exemption granted on account thereof under the Selective Service Law.

EDWARD S. SHATTUCK

Major, United States Army

Chief, Legal Division

January 25, 1941

File Reference III—Ministers

Sec. 5 (d); Par. 360b

COPY OF LETTER FROM CONGRESSMAN MARTIN J. KENNEDY APPEARING IN PRINTED "HEARINGS BEFORE THE COMMITTEE ON MILITARY AFFAIRS, HOUSE OF REPRESENTATIVES, SEVENTY-SIXTH CONGRESS, THIRD SESSION, on H. R. 10132;

Pages 628-630

HOUSE OF REPRESENTATIVES,
Washington, D.C., August 7, 1940.

MILITARY AFFAIRS COMMITTEE,

House of Representatives.

GENTLEMEN: To me it seems imperative that action be taken by your committee to insure that the Wadsworth bill be so modified as to make due provision for the religious life of the American people. As you know the sole provision of the bill in this matter is the President's right to defer the service rendered by ministers of religion actually engaged in ministerial duties. No provision is made for those who are preparing for the ministry: seminarians. Nor is any provision made for those indispensable members of a religious community, whose duties it is to attend to the domestic work of the religious house—the coadjutor brothers. These men make it possible for priests to attend to their proper work.

To me it seems clear that the good of the American people requires that all these classes—clergymen, seminarians, and Brothers—be exempted from service under the bill.

Many reasons why this statement is true must occur to your mind; let me mention those which seem of weight to me. I shall not offer arguments which might appeal to my coreligionists, but such as must weigh with every thoughtful American.

It is evident to intelligent observers that religion is the backbone of all moral conduct; religion supports authority, teaching respect for law and order. Principles derived from religious moral teaching make the average man an honest man, a law-abiding citizen. Teaching, for example,

that God forbids murder under threat of eternal punishment, religious instructors have proposed a motive for avoiding this crime far in excess of any which the state can assign or carry out; and so also of all other crimes. It is, therefore, good public policy to provide for the continued and flourishing existence of religion; I do not, of course, suggest any link with any particular form of religion but an even-handed dealing with all religious bodies.

Religion is one of the needs and demands of the American people. In fact, the bill under discussion may be said to recognize this need, since it makes some effort to provide for religious ministers. The precise point is that the provision of this bill in this respect is not adequate.

Granted that religious ministers are to receive some consideration under this bill, consistency and thoroughness require that this consideration (1) amount to total exemption from training and service, and (2) be extended not only to ministers already ordained, but also to the two groups mentioned above, seminarians and Brothers.

Let me take the three points that here suggest themselves in order:

1. Total exemption of ordained clergymen.
2. Total exemption of seminarians,
3. Total exemption of Brothers.

1. Total exemption of ordained clergymen. The American people enjoy the right to exercise freely their right to worship. To do this adequately, each religious group requires and desires that it be possessed of a group of trained religious educators and leaders known as the clergy. The principle, therefore, that each man should serve where he will do the most good and best further his country's interests in time of war requires that in time of war the clergy remain clergy. That is their specialty. There they are most efficient. There they are most needed. It is a well-known adage that "without hope the people perish." And truly this is especially manifest in time of war when

the buoyant and hopeful solution of life given by religion alone suffices to lift up fainting spirits.

2. Total exemption of seminarians. The public need for a properly trained clergy already described is a permanent thing, lasting as long as there endures the ineradicable tendency in man toward higher things. To satisfy this permanent need, a continuous stream of trained religious leaders must be entering upon their work. This cannot be if we do not permit our seminaries to continue their normal functioning. For where are we to find our future ministers of religion if not in seminaries? It must be clear that if you take away the seminaries of today you take away the priest, minister, or rabbi of tomorrow. And whether the morrow bring peace or war, we can ill afford to lack spiritual leaders, be they chaplains to encourage and befriend our soldiers or be they pastors who instruct and serve our people.

But it may be objected that there is no intention under the bill of destroying the seminarian class, that all that is required is a temporary interruption of the course pursued by the seminarian. To this objection, let me answer, first, that such an interruption of a full year in the midst of a course of study which of its nature is continuous and closely linked would be an immense set-back in the progress of the seminarian toward his goal. Secondly, and this response is more basic, the objection misses the whole point at issue. That point is precisely this: The seminarian is destined to serve the people as a clergyman, whether in peace or in war. Hence any training of him for other work is a needless waste of time and money.

The measure to be taken, therefore, is one recognizing the principle that an adequate clergy group is a really fundamental necessity in time of war and hence, parallelly, an adequate seminarian group is a real necessity in time of preparation. No bona fide seminarian should be shunted off the course he has entered upon and drafted into some

other field of public service, thus deserting the line for which he is best adapted.

This leads us to another seeming objection to my proposal, which, in fact however, has no weight. That is the objection that spurious seminaries and seminarians will suddenly appear all over the country in order that conscription be evaded. Even if some less spirited youths might be tempted to try this ruse, is it not clear that a little careful examination of each institution will quickly reveal which are genuine seminaries containing sincere seminarians and which are so-called seminarians containing opportunists? For, surely, it is a matter of public record in each locality which seminaries have been in existence for a term of years before the war scare sufficient to prove that avoidance of military service had nought to do with their existence. Again, the records of these seminaries will reveal the average number of entrees each year. Only if the number this year notably exceed that of recent years may suspicion be cast on the genuine good intentions of those entering this year.

3. Total exemption of Brothers. We may distinguish two types of Brothers; viz: those who directly serve the people at large for example by teaching, and those who do so indirectly, namely by directly serving priests or other religious who in turn serve the people directly. I contend that both classes should be totally exempted from military service and training. This exemption is due to the first class—those who serve the people at large directly—because their functions are necessary both in peace and war. Let us consider the offices performed by the second group a little more closely. These men do the manual work necessary in religious communities and institutions. Their ministrations, given freely, are absolutely necessary, if the priests are to be free to attend to their special work. Hence, the arguments which prove the need of clergy prove likewise the need of these relatively few, but very important mem-

bers of religious communities. They also ought, therefore, to be exempted.

I hope my suggestions will receive the favorable consideration of the committee.

I would be pleased to have this letter included in the hearings.

Respectfully submitted.

MARTIN J. KENNEDY

FILE COPY

Office - Supreme Court, U. S.

FILED

NOV 19 1943

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

**Petitioner's
REPLY BRIEF**

**HAYDEN C. COVINGTON
VICTOR F. SCHMIDT**
Attorneys for Petitioner

HAYDEN C. COVINGTON, of Counsel

INDEX

SUBJECT INDEX

| | PAGE |
|---|------|
| Title of cause | 1 |
| Clarification of questions presented | 2 |
| Petitioner's status under the Act entitles him to exemption from training and service | 4 |
| Plea in abatement not urged to present issues | 9 |
| Scope of judicial review | 10 |
| Presumption of innocence is that petitioner was under no statutory duty | 13 |
| Petitioner has right to defend against indictment .. | 15 |
| (A) Habeas corpus no more efficacious than right to defend against indictment | 15 |
| (B) Concerning practical considerations | 17 |
| (1) Congress considering there arguments has not limited available defenses | 18 |
| (2) Certain cases relied upon by Government distinguished | 18 |
| (3) Defense to indictment is no more harassing than habeas corpus | 19 |
| (4) Denial of due process cannot be used to discourage violation of the Act | 19 |
| The administrative order here sought to be reviewed is not interlocutory but is final | 21 |
| Petitioner attacked decision of both local board and appeal board by his plea to their jurisdiction | 22 |
| Petitioner attacked decision of both local board and appeal board by offering to show denial of personal appearance before local board | 24 |
| Director of Selective Service never at any time passed upon petitioner's ministerial status | 25 |
| Whether or not petitioner introduced his entire file into the evidence to support his attack against the boards' jurisdiction is immaterial | 26 |

SUBJECT INDEX

| | PAGE |
|--|------|
| <i>Bowles</i> case not in point here | 29 |
| Documentary evidence offered should have been admitted in trial court regardless of whether issue was one of fact or law | 30 |
| The 'draft scheme' as applied to Jehovah's witnesses by National Headquarters of the Selective Service System | 32 |
| (A) Petitioner does not claim unfair administration of the Act by the executive branch against Jehovah's witnesses | 32 |
| (B) Analysis of certified official list of Jehovah's witnesses promulgated by National Headquarters of Selective Service reveals falsity of Government's charge of abuse | 34 |
| Table of history of certified official list | 36 |
| (C) Analysis of records of Watchtower Bible and Tract Society reveals falsity of Government's charge of undue increase in its roll of full-time ministers | 38 |
| Conclusion | 43 |
| APPENDIX A, Letter from Lewis B. Hershey, Director, Selective Service System, dated July 7, 1943 | 45 |
| APPENDIX B, Excerpts from Brief of Appellee in <i>Benesch v. Underwood</i> , No. 9271, U. S. C. C. A., Sixth Circuit | 49 |
| APPENDIX C, Letter from Carlton S. Dargusch, Deputy Director, Selective Service System, dated October 18, 1941 | 50 |
| APPENDIX D-1, Letter to Carlton S. Dargusch, Deputy Director, Selective Service System, dated April 21, 1942 | 52 |
| APPENDIX D-2, Letter to P. H. Winston, Selective Service System, dated May 19, 1942 | 53 |

CASES CITED

| | PAGE |
|---|----------------|
| Beneschi v. Underwood | |
| 132 F. 2d 430 | 21, 25 |
| Blair v. United States | |
| 241 F. 217, cert. den. 244 U. S. 655 | 32 |
| Bowles v. United States | |
| 319 U. S. 33 | 23, 25, 29, 30 |
| Burfenning v. Chicago St. P. Ry. Co. | |
| 163 U. S. 322, 323 | 11 |
| Caha v. United States | |
| 152 U. S. 211, 221, 222 | 25 |
| Cain, Ex parte | |
| 39 Ala. 440, 441 | 5 |
| Cain v. United States | |
| 19 F. 2d 472 | 32 |
| Catanzaro, Sam, Jr., In the Matter of the Petition of, for Writ of Habeas Corpus | |
| — F. 2d — (CCA-3), decided Sept. 23, 1943 | 22 |
| Clyatt v. United States | |
| 197 U. S. 207, 221-222 | 10 |
| Crawford v. United States | |
| 212 U. S. 183, 203 | 28 |
| Crowell v. Benson | |
| 285 U. S. 22, 58 | 8, 10, 27 |
| Dunlop v. United States | |
| 165 U. S. 486 | 14 |
| Edwards v. United States | |
| 7 F. 2d 357 | 14 |
| Edwards v. United States | |
| 312 U. S. 473 | 27, 28 |
| Givings v. Zerbst | |
| 255 U. S. 11, 20 | 8 |
| Goff v. United States | |
| 135 F. 2d 610 | 9 |
| Grimley, In re | |
| 137 U. S. 147 | 8 |

CASES CITED

| | PAGE |
|---|----------------|
| Hirabayashi v. United States | |
| 319 U. S. —, 63 S. Ct. 1375 | 12 |
| Houston v. Moore | |
| 5 Wheat. 1, 35 | 18 |
| Johnson v. United States | |
| 318 U. S. 189, 200 | 9, 44 |
| Martin v. Mott | |
| 12 Wheat. 19 | 18 |
| McGinis v. California | |
| 247 U. S. 95 | 28 |
| Monongahela Bridge v. United States | |
| 216 U. S. 177 | 12 |
| Morton v. Nebraska | |
| 21 Wall. 660 | 11 |
| Ng Fung Ho v. White | |
| 259 U. S. 276 | 8 |
| Paquete Habana, The | |
| 175 U. S. 677, 696 | 25 |
| St. Joseph Stock Yards Co. v. United States | |
| 298 U. S. 38, 49-54 | 27 |
| Thornton v. United States | |
| 271 U. S. 414, 420 | 25 |
| Tot v. United States | |
| 319 U. S. —, 63 S. Ct. 1241 | 14 |
| United States v. Atkinson | |
| 297 U. S. 157, 160 | 10 |
| United States v. Carver | |
| 260 U. S. 482, 490 | 26 |
| United States v. Grieme | |
| 128 F. 2d 811 | 19, 20, 28, 30 |
| United States v. Taylor | |
| 11 F. 470, 471 | 32 |

CASES CITED

| | PAGE |
|----------------------------|-----------|
| Wise v. Withers | |
| 3 Cranch 331 | 4, 10, 18 |
| Wong Wing v. United States | |
| 163 U. S. 228 | 16 |

OTHER CITATIONS

STATUTES

| | |
|--|-------------------|
| Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Appendix 301-318) | |
| Sec. 5 (d) | 25 |
| Sec. 11 | 13, 16, 18, 21-22 |
| United States Constitution | |
| Amendments V, VI | 17 |

REGULATIONS

| | |
|-------------------------------|-------|
| Selective Service Regulations | |
| 623.2 | 9, 30 |
| 625.1 | 24 |
| 625.2 | 24 |
| 625.2 (b) | 30 |
| 627.12 | 24 |
| 627.26 | 22 |
| 628.1 | 26 |
| 651.1-651.8 | 21 |

MISCELLANEOUS

| | |
|-----------------------------------|--------|
| ALMIGHTY GOD, Word of [The Bible] | |
| Psalm 127: 1, 2 | 43 |
| Isaiah 9: 6, 7; 40: 28-31 | 43 |
| Matthew 9: 37, 38 | 42 |
| Matthew 24: 14 | 42, 43 |
| 1 Corinthians 3: 5-7 | 43 |
| Hebrews 10: 24, 25 | 43 |
| 1 Peter 4: 7-11 | 43 |

OTHER CITATIONS

| | PAGE |
|---|-------------------|
| Bone, Senator, Amendment to Burke-Wadsworth Bill | 16 |
| Brief of Appellee, in <i>Benesch v. Underwood</i> (132 F. 2d 430), APPENDIX B | 25, 49-50 |
| Crowder, Gen., Provost Marshal General, testimony before Committee on Military Affairs of the House of Representatives (Selective Training Act of 1917) | 5 |
| <i>Federalist, The</i> , paper No. XII | 2 |
| Haines, C. Grove, <i>The American Doctrine of Judicial Supremacy</i> , revised ed., passim | 44 |
| Hamilton, Alexander (<i>The Federalist</i> , paper No. XII) | 1-2 |
| Jones on Evidence, Civil Cases 4th ed., Vol. 1, pp. 176-180 | 14 |
| Letter from General Hershey, Director, Selective Service System, APPENDIX A | 25, 33, 37, 45-49 |
| Letter from Carlton S. Dargusch, Deputy Director, Selective Service System, APPENDIX C | 34, 50-51 |
| Letter to Carlton S. Dargusch, Deputy Director, Selective Service System, APPENDIX D-1 | 35, 52 |
| Letter to P. H. Winston, National Headquarters, Selective Service System, APPENDIX D-2 | 35, 53-54 |
| Opinion No. 14, Director of Selective Service System | 9 |
| Underhill's Criminal Evidence, pp. 49-54 | 14 |

OTHER CITATIONS

| | PAGE |
|----------------------------------|------------|
| Yearbooks of Jehovah's witnesses | |
| 1933 | 38 |
| 1934 | 38 |
| 1935 | 38 |
| 1936 | 38 |
| 1937 | 38 |
| 1938 | 38 |
| 1939 | 38 |
| 1940 | 38 |
| 1941 | 38, 40 |
| 1942 | 38 |
| 1943 | 38, 39, 41 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA



**ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITIONER'S REPLY BRIEF

In an honest endeavor to discharge its duty to stand for and by the judgments of the courts below and to defend them before this Court, the Government has become hopelessly ensnared in many entangling arguments with which the courts below became enmeshed.

This is the result of the effort to justify denial of due process and to sanction the inhibition of the fundamental right to be heard. That sacred right cannot be inhibited.

The Government's plight brings to mind words of Alexander Hamilton, who overcame the plague of specious arguments of honest men who thought they were working for the best interest and welfare of the people in fighting against adoption of the federal Constitution. Of that situa-

tion Hamilton said: "It is astonishing, that so simple a truth should ever have had an adversary; and it is one, among a multitude of proofs, how apt a spirit of ill informed jealousy, or of too great abstraction and refinement, is to lead men astray from the plainest paths of reason and conviction."¹

Through the eloquence of Government's counsel and the appealing demands of expediency relied upon by them, he who is unsuspecting of the consequences may easily follow the Government in the broad and winding road chosen by the courts below.

Although this reply brief is longer than is usual, its length is necessary to afford petitioner due opportunity to answer the specious arguments and factitious conclusions of the Government. A painstaking analysis of each of those arguments is here presented out of an abundance of caution, solely to help this court and to avoid possibility of any member of the court being led astray from the straight and narrow way of the fundamentals involved.

Petitioner's right to be heard in his defense is so simple and fundamental that the humblest layman in all the land will not dispute it, and certainly judges should not deny it.

Refusal of the trial judge to allow the fundamental issue of exemption and want of jurisdiction to be introduced has brought this case here. It is strange that the Government is blind to the right to be heard on the plea of *not guilty* raising these questions. Misconception of these fundamentals pervades the entire brief of the Government.

Clarification of Questions Presented

It is significant to note, then, how the Government seeks to avoid taking cognizance of this issue in its statement of the questions involved. (Br. p. 2) The very FIRST question posed by the Government seeks to limit the issue to whether

¹ *The Federalist*, paper No. XII.

or not the court can "try *de novo* the merits of his classification" and entirely overlooks the issue of whether or not the draft board lacks jurisdiction to issue the induction order because of petitioner's statutory exemption from duty under the Act—non-compliance with which induction order is an element of guilt under the Act.

Similarly, the SECOND question stated by the Government attempts to narrow petitioner's claim to whether the trial court may decide whether the board acted "fairly and upon evidence". Petitioner's claim in truth and in fact is not limited to this narrow question, but involves the much broader issue of whether or not the trial court can determine if the board had jurisdiction to issue the induction order to one who is *exempt* from duty.

Question number THREE does not properly pose the issue because on the questions of *want of jurisdiction* and *exemption* the court can make a *de novo* inquiry and hear evidence *de novo*, not limited to material in the draft file. The Government would have the court believe that the only "question" sought to be raised by petitioner was whether or not the board was "prejudiced" in considering his case. Again it is manifest that claimed prejudice relates to an incidental issue of the board's non-compliance with administrative procedure governing its conduct by denying a hearing and personal appearance before the board, and does not approach the real issue of want of jurisdiction on the part of the draft board. The issue of whether or not the undisputed evidence establishes *want of jurisdiction or exemption* was not limited, as urged by the Government, to "claimed prejudice on the part of the local board only". The "claimed prejudice" was in connection with only one of the offers of proof and does not pertain to the issue of want of jurisdiction on the part of the board as raised in other offers of proof, motion to dismiss, objections to the charge and requested charges. The Government's proof showed a *want of jurisdiction* on the part of the board; and the alleged defects in certain offers of proof urged in its question THREE

do not affect the power of this court to hold that the indictment should have been dismissed, or that the court erred in charging the jury and in denying the requested charges.

**Petitioner's Status Under the Act
Entitles Him to Exemption from Training and Service**

Elsewhere in the brief the Government intimates that the question here presented is whether or not the board allowed a fair hearing, acted contrary to evidence, arbitrarily and capriciously denied claim for classification, or erred in judgment. The defendant, who is a *minister* and exempt from duty under the Act, is not thus limited in his defense to the indictment. He is entitled to have the court or jury find, independent of any narrow-gauge inquiry, whether or not he is a "minister of religion" and as such exempt from duty under the Act. If the Government fails to prove beyond a reasonable doubt that the registrant is under a duty to serve, a judgment of dismissal of the indictment must issue for want of jurisdiction of the local board.

The Government's difficulty seems to be that it fails to recognize the distinction between the status of persons ~~exempt~~ from obligations imposed by an Act of Congress and the status of persons subject to the obligations of such Act but who, in the discretion of the administrative agency, may be *deferred* for reasons found valid by the administrative agency.

When one is of a class of persons expressly exempted by an Act of Congress from any duty thereunder an agency charged with administering the act has no jurisdiction to direct the exempted person to perform duties required of those subject to the act. The anomalous position of the Government on this question is contrary to an old and unanimous opinion by this court in *Wise v. Withers*, 3 Cranch 331. There the Militia Act of 1792 exempted officers of the federal government from training and service. Wise, a justice of the peace of the District of Columbia, refused

to report for induction as directed by the administrative tribunal. He was proceeded against according to the statute before the military tribunal and his property confiscated. Chief Justice Marshall, speaking for the court, held that a justice of the peace of Washington, D. C., was a federal officer within the meaning of the act and hence the tribunal was without jurisdiction to order Wise to report. This court said that the order was void and was, therefore; subject to a collateral attack. That case is discussed in petitioner's main brief, pages 60-61.

History of prior draft and militia acts of this country fails to reveal any case where a minister has had a controversy with draft authorities in the courts as to his ministerial exempt status. It is assumed that it was so plain that no "board" has dared to transgress the acts of Congress creating the exemption. The only case to be found in the state reports involving the militia acts is that by the Supreme Court of Alabama in the case of *Ex parte Cain*, 39 Ala. 440, 441 (petitioner's main brief, pages 74-75), holding that a draft board, under the conscription act of the Confederacy during the Civil War, did not have jurisdiction to induct a minister for military service. This indicates that there can be no distinction between exempt status of a federal officer and the exempt status of a minister of religion.

By terms of the Selective Training and Service Act "regular and duly ordained ministers of religion" are exempt from training and service and are, therefore, beyond the induction process of the local boards. "There are included in the legislative exemptions those classes whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them."²

² General Crowder, Provost Marshal General, testifying before the Committee on Military Affairs of the House of Representatives when the Selective Training Act of 1917 was being considered. See petitioner's main brief, pages 66-67; also, footnote '99, page 68, op. cit.

The Government's erroneous claim, that there is no such distinction, is based upon the false conclusion reached by a distortion of the language and intent of Congress. The Act provides that the local and appeal boards shall have the power to determine all questions or claims with respect to exemption or deferment from training and service. The Government contends that this provision gives uncontrolled discretion to such boards to construe and misconstrue both the Act and the administrative regulations, while the federal courts must keep "*silence*" and merely stand by to *punish* those who may run afoul of the boards' determinations. (Brief, pages 17, 21, 24-25) Under this interpretation any conflict between the Congressional legislation and the administrative application thereof would at once be resolved in favor of the latter, while the United States court would be powerless to interfere. This makes the administrative board the *supreme court* for construction of the Act, and its determinations become the *supreme law* of all the land.

All the Act requires of a minister is to register with his local board so that the Selective Service System has a record of him as a *minister*. Each "minister of religion" fills out a questionnaire and in the space provided (Series VIII. See Record, page 56.) may state that he is a *minister of religion*. The power of the board to decide the claim of exemption does not expand the jurisdiction of the board to a point of allowing the induction of a minister, exempt from training and service. Petitioner's claim for statutory exemption because of occupying the office of *minister* is fixed, definite and certain; and can be as easily determined as the claim for statutory deferment made by a governor, judge, congressman, state legislator, or vice-president of the United States.

Congress has determined the exempted class. If in fact one is a minister, duly recognized by his denomination, the board has no discretion to deny the claim. The making of the claim for exemption as a minister is tantamount to

making a claim that the local board does not have jurisdiction over the individual making the claim. The board has the duty and the power to determine this *plea to its jurisdiction*; but the fact that it decides that it has jurisdiction to induct does not give it such jurisdiction. The making of the plea to the jurisdiction by a minister is analogous to a defendant making a plea to the jurisdiction of a court. If the court is without jurisdiction to render a final judgment against defendant, its findings and judgment are void and may be collaterally attacked in another court anywhere at any time. When a local board orders a "minister of religion" to report for induction it is equally as void as a judgment of a justice of the peace rendered on default of defendant for \$1,000,000 or for title to real estate. If a justice of the peace should entertain such suit or action against another, the defendant has the right to appear and file a plea in abatement, a plea to the jurisdiction of the court. The fact that the defendant files such a plea does not confer jurisdiction upon such justice of the peace regardless of whether the plea is overruled or sustained. The draft board entering a proper IV-D classification for an ordained or regular minister acts in the same manner as the justice of the peace in sustaining the plea to his jurisdiction. Denial of the claim does not confer jurisdiction on the board to induct the registrant to perform service under the Act, any more than would the denial of the plea to the jurisdiction of the justice of the peace give him jurisdiction.

An ambassador to the United States from another nation is exempt from the jurisdiction of all courts inferior to this court. Suppose an ambassador were sued in some inferior court. Without doubt he could question the jurisdiction of that court. That the inferior court has the privilege of hearing and deciding a plea to the jurisdiction does not give that court jurisdiction over the ambassador. If a defendant in such a circumstance impersonated an ambassador and *falsely* made the claim, such inferior court could

find the claim to be fictitious and on that ground overrule the plea to the jurisdiction.

The same analogy applies to the power of the local board when one claims exemption because an ordained minister, or deferment because a judge, legislator or governor. If a man is in truth and in fact authorized by a recognized Christian organization, there is only one thing a board can do when he claims ministerial exemption from service and that is to place him in Class IV-D. If the claim for exemption is falsely made or is fictitious, then and only then can the board deny the claim. But in such instance he must be found guilty of false swearing or perjury in his claim, because until his claim is impeached or controverted by *written evidence* in his file he is entitled to the exemption claimed. Before any court or board can reject the claim for ministerial exemption it must be established that the registrant or defendant has violated the provisions of the statute forbidding false swearing. A board has no discretion to decide whether it will give the vice-president of the United States a deferment or deny a "minister of religion" an exemption granted by Congress. Until the claim is impeached as a *false claim* the board has no discretion to deny it.

It is said that claiming citizenship in deportation cases constitutes a plea to the jurisdiction requiring a *de novo* inquiry by the court. See *Ng Fung Ho v. White*, 259 U. S. 276, where it was said that in cases reviewing validity even of court-martial convictions a *de novo* inquiry could be made on jurisdictional issue of whether one actually volunteered or was subject to military authority. This was also stated in *Crowell v. Benson*, 285 U. S. 22, at 58. See also *Givings v. Zerbst*, 255 U. S. 11, 20; *In re Grimley*, 137 U. S. 147.

The Government does not contend that there was any evidence before the board that might indicate that petitioner was not recognized by the *Watchtower Society*, or that he was not actually ordained as a minister of Jehovah's witnesses, or that he was not actually preaching *full time* as a

pioneer at all times herein. The Government concedes that the Watchtower Society and Jehovah's witnesses are recognized religious organizations under the Selective Training and Service Act. It is conceded that the director has declared them to be so "recognized" under the Act. There is nothing in the file of petitioner that impeaches or negatives any of the above facts. All evidence must be reduced to writing by the local boards and placed in the file. (Reg. s. 623.2. See, also, Opinion No. 14, par. 6, Appendix pp. 39a, 43a.) There is no such evidence in the file which might dispute the claim for a IV-D classification. The Government does not contend that petitioner falsified his questionnaire or falsely impersonated a minister. This makes it mandatory that petitioner be declared exempt *as a matter of law*.

Plea in Abatement Not Urged To Present Issues

The Government in its brief would have the court believe that the vital question, as to whether petitioner should be declared exempt, is presented to this court by an assignment of error on the trial court's action in overruling the plea in abatement to the indictment. The assignment of error as to overruling this plea is not briefed and is not urged in this court. It is doubtful that a plea in abatement is the proper way to raise the question of exemption from duty under the Act. (See *Goff v. United States*, 135 F. 2d 610.) The fundamental question of *exemption* was presented on the trial court's overruling the motion to dismiss the indictment presented at the close of the Government's case. This court can *sua sponte* determine whether upon all the evidence the defendant is not guilty and the indictment should be dismissed. (See cases cited in footnote 97, page 67, petitioner's main brief.) In *Johnson v. United States*, 318 U. S. 189, 200, 63 S. Ct. 549, 555, the court said: "It is true that we may of our own motion notice errors to which no exception has been taken if they would seriously affect the fairness, integrity or public reputation of judicial pro-

ceedings.' See *United States v. Atkinson*, 297 U.S. 157, 160; *Clyatt v. United States*, 197 U.S. 207, 221-222."

Scope of Judicial Review

The Government attempts to avoid the impact of *Crowell v. Benson*, 285 U.S. 22, on the theory that "ministers are not constitutionally exempt". (See Government's brief, pp. 16, 26-27) This argument does not "hold water" because the *de novo* jurisdiction of the United States District Court does not depend on whether "freedom of religion" guarantees an exemption from military training and service. Freedom of worship under the *First Amendment* is not involved or presented here. *Crowell v. Benson*, *supra*, applies because the constitutional right of due process of law has been violated by the local board in denying the petitioner his liberty by ordering him to report for training and service when the undisputed evidence before the board showed that he had a statutory right of exemption because he was in fact a minister. The denial of that statutory right constitutes a denial of liberty without due process of law by the board so as to permit the federal court to make a *de novo* inquiry. The Government's argument that *Crowell v. Benson*, *supra*, does not apply because the Act places the duty on the boards to decide claims for exemption is contrary to *Wise v. Withers*, 3 Cranch 331. See pages 4-5, *supra*, this reply brief.

If, while in office, a congressman, a judge, a state legislator, or the nation's vice-president, believing he could serve the country better on the "home front" by remaining at his post of duty than by going to the "battle front", were erroneously denied his statutory deferment from training and service and he thereafter refused to report for induction and was indicted, could such official set up his statutory deferment as a defense? It must be admitted that in such an instance the district court could make a *de novo* inquiry as to his status under the Act.

The right to a *de novo* judicial determination of the statutory exemption of a minister is also controlled by the "Land Office cases", involving tracts of land of the type exempt from homestead and preemption, where Land Office orders granting patents were held not to convey title. Such orders have been held subject to *de novo* judicial inquiry on whether the Land Office had *jurisdiction* over exempt lands despite finding of fact that they were not exempt. *Burfenning v. Chicago St. P. Ry. Co.*, 163 U. S. 322, 323; *Morton v. Nebraska*, 21 Wall. 660, which are closely in point.

In any event, the district court, in the exercise of its judicial powers in a criminal case, must ascertain whether a defendant, who has pleaded not guilty, is under any duty to undergo training and render service required by the Act. While it is contended that the court cannot make a *de novo* inquiry as to petitioner's ministerial claim, it must, at least, review the Selective Service *file* of the registrant, and decide whether the registrant is exempt from duty or whether the local board lacked jurisdiction to issue an induction order.

In respect to the statutory exemptions allowed by Congress, the relation between the district court and the local board is very much like that between this court and the highest court of a state in a controversy where a *federal question* is involved. In such instances the district court has jurisdiction to review the question of statutory exemption. In regard to those subject to training and service and the administrative deferments that are allowed them in the discretion of the Selective Service System the power of the district court *may* be claimed to be analogous to that of this court on local or non-federal questions in controversies coming up from state courts, except the district court may review classifications where there is shown to be a violation of *due process* of procedure or discrimination against an individual in such instances of discretionary deferments.

The Government greatly stresses and leans heavily upon *Monongahela Bridge v. United States*, 216 U. S. 177. This case breaks away and gives no support to the Government because it did not involve a case of statutory exemption but presented the instance where one subject to the Act empowering the Secretary defied his order. If the bridges involved in that case had been exempt by Act of Congress instead of administrative discretion, the jury would have been permitted to pass upon the question of exemption.

Hirabayashi v. United States, 319 U. S. —, 63 S. Ct. 1375, does not govern the issues presented in this case. The question involved there was whether the *curfew order* was an unconstitutional delegation of authority and discrimination against Japanese. The validity of the exclusion order was not determined in that case. The orders were made on a race or group basis and not on an individual basis as are determinations by local boards under Selective Service Regulations. It can be assumed with confidence that if the law or the orders involved in that case provided for exemption of "loyal" Japanese an inquiry thereof would have been permitted in defense to an indictment charging a violation. Suppose that a Filipino or a *Chinaman* had been mistakenly included in the *curfew order* or the *evacuation order*, and for violation of either or both he were indicted. It must be conceded that in defense to indictments identical to the charges in the *Hirabayashi* case the Filipino or *Chinaman* thus ensnared could prove his nationality and show that the statute and orders did not apply to him. It would be a violation of due process to compel him to comply with the orders as a condition precedent to questioning them.

In the *Hirabayashi* case the defendant actually defied the *curfew order* and the *evacuation order*. Nevertheless this court considered his defense that the *curfew order* was void. In that case the Government did not contend that the defendant was not entitled to raise and the court was not entitled to consider the defenses urged because he had not

complied with the order. If a defense as to the *constitutionality* of a particular order can be considered on the ground that it involves a determination of the constitutionality of the curfew order, then with equal force of reason the *courts* can also construe the order or statute and consider whether the particular order is applicable to the facts or is illegal because contrary to the statute authorizing it, in that the person affected is *exempt* or the administrative agency *did not have jurisdiction*, without requiring that he comply with the order. It seems plain that if an order of an administrative agency is legal it should not and can not be flouted; but that if an order of such agency is illegal and void, then as a matter of fact it cannot place any citizen under an obligation to do anything. If the citizen chooses to ignore an invalid, unlawful order, no one would contend that he would be prevented from setting up this fatal defect in any subsequent prosecution that might be instituted against him.

Presumption of Innocence Is that Petitioner Was Under No Statutory Duty

The brief of the Government attempts to chisel down the presumption of innocence of the petitioner. (Br. pp. 22-23) It is said that the presumption is limited to the fact that he did not disobey the order and that if he did, he did not do so willfully. (Br. p. 22) Petitioner is prosecuted for an alleged violation of the criminal sanction clause (Sec. 11) of the Selective Training and Service Act. Elements of guilt defined in the statute are much broader than the narrow presumption allowed by the Government. The statute provides: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act." In the case of a registrant an element of guilt noticeably involves the duty for training and service. The presumption of innocence, if it means anything, necessarily includes the presumption of 'no duty', so as to place upon the Government the burden of proving a duty or obligation and trans-

gression thereof beyond a reasonable doubt. The Government excuses itself from this responsibility by reclining upon the presumption of validity of the order to report for induction. This presumption *gives way* under the weight of the heavier and stronger presumption of innocence, and the soft bed which the Government builds for itself collapses.³

Here the district attorney did not rely solely upon the presumption of validity of the order to report. Had he real faith in the *soundness* of the Government's position he would have rested with the order to report for induction. But he went further and also introduced the questionnaire. The questionnaire refuted the claim of duty, because it showed petitioner exempt. The Government did not show, or even contend until *after* reaching this court, that *he was not* entitled to the exemption.

The danger to the public and to the courts of the Government's position appears when the same whittling process is applied to the presumption of innocence in a murder case. The defendant is presumed to be not guilty of killing with malice aforethought. The Government, however, would limit the presumption, by the rule urged in this case, to whether or not the defendant intentionally shot a bullet into the body of the deceased. Of course, the reason for the Government's position on the presumption becomes apparent. It is necessary to narrow the presumption in order to support the equally ridiculous position that a defendant cannot show in defense to the indictment that he has no duty under the Act.

³ No legal presumption is so highly favored as that of innocence; ordinarily, substantially all other presumptions yield to it in case of conflict. *Jones on Evidence, Civil Cases*, 4th Ed., Vol. 1, pp. 176-180; *Dunlop v. United States*, 165 U. S. 486; *Edwards v. United States*, 7 F. 2d 357; *Underhill's Criminal Evidence*, pp. 49-54. See also *Tot v. United States*, 319 U. S. —, 63 S. Ct. 1241.

Petitioner Has Right To Defend Against Indictment

(A)

HABEAS CORPUS NO MORE EFFICACIOUS THAN RIGHT TO DEFEND AGAINST INDICTMENT

Petitioner agrees with the Government that the defenses available under the statute have not been expanded. The Government must concede that the defenses have not been narrowed or reduced in scope by the terms of the Act. The plea of *not guilty* necessarily raises all defenses available, so as to include the defense of *no duty* for training and service under the Act. The Government admits that the district courts can inquire into the duty of the registrant for training and service under the Act, but says that it can do so by habeas corpus only after the registrant has reported. The distinction drawn by the Government so as to allow one who submits to an *illegal* order the right to question it and, on the other hand, to deny the person who refuses to submit to the illegal order the same right, is an arbitrary discrimination that violates the *due process* clause. This specious argument can be given a reverse application so as to deny the writ of habeas corpus. If defiance of an illegal order is ground for denying a defense to an indictment for failure to comply with it, then, by equal force of reason, the submission and consent to an illegal order would waive the right to attack it. Respondent's argument ignores entirely the right of the registrant to defend himself against a local board that flouts the law and tyrannically acts unlawfully and arbitrarily against him.

Local boards are not above the law which created them. They must recognize the exemptions Congress decreed in the same act which gives the boards existence.

In attempting to gain credence for its argument in this case, the Government drives a peg into the wall and hangs its *hat* thereon by claiming that the Act which provides

decisions of local boards "shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe", means that a district court is powerless to review, in criminal prosecutions under the statute, the action of a local board illegally ordering one to report for induction. The same contention is made with respect to the effect of the provision that boards "shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption . . ." That "peg" falls out when it becomes apparent that the same provisions could, by the same token in habeas corpus cases, also be used to deny the district court authority to review a classification *after* induction. If it cannot be denied an inductee *after* induction, then there can be no grounds for denying the right to a registrant who refuses to comply with the order and defends against the indictment charging him with a violation of the Act.

The Government's argument that an admitted defense is not available to the defendant indicted under the Act has the effect of denying the registrant a trial in the district court contrary to Section 11 of the Act.⁴ Such construction gives the Act an unreasonable and arbitrary and unconstitutional interpretation. It is contrary to the spirit of the Constitution as expressed in the opinion of this court in *Wong Wing v. United States*, 163 U.S. 228.⁵ If the law-makers intended what the Government says they did, then Congress would have dispensed with the formality of requiring the registrant to *run the gantlet of trial by ordeal*—a "per curiam" trial in the district court on the one question, "Did you report?"

In its brief the Government seeks to justify its confession that district courts can inquire into the exemption of

⁴ See Senator Bone's amendment to the Burke-Wadsworth Bill quoted at page 46 of petitioner's main brief.

⁵ See petitioner's brief, pages 33, 55.

the registrant or want of jurisdiction of the local board by habeas corpus proceedings, on the ground that the citizen has the constitutional right of habeas corpus. It is inferred thereby that a defendant in a criminal case does not have the right under the Constitution to defend, especially in a *Selective Service* case. This is an extraordinary revelation in the field of constitutional law and criminal procedure. It seems clear that the Bill of Rights (Amendments V and VI) guarantees the right to make a defense to an indictment charging crime. This should emphatically refute the Government's claim that the defenses of statutory exemption from duty and want of jurisdiction on the part of the local board are not secured to the petitioner by the Constitution.

Petitioner agrees with the Government that habeas corpus is an available remedy to one wrongfully inducted. The fact that habeas corpus is available *after* conviction does not mean that the right of defense is deniable any more than it can be said a contention that an indictment was returned in violation of the Bill of Rights can not be urged in defense at the trial on the theory that the same defect could be urged upon habeas corpus after conviction. Habeas corpus is not an exclusive remedy but has always been regarded as extraordinary, never available as a substitute for statutory and other constitutional remedies.

(B)

CONCERNING PRACTICAL CONSIDERATIONS

To protect itself from toppling off the swaying tower of "legal" *considerations* it erected to hold itself above the reach of the *due process* clause, the Government has constructed a net of entwined sophistry wherein to arrest the impending fall, which "net" it styles the "practical considerations"—"*The administrative process must not be unnecessarily impeded.*" (Br. pp. 30-53) When put to the *fiery* test of judicial scrutiny that network of *policy* arguments blows away as *smoke* before the wind.

- (1) *Congress considering these arguments has not limited available defenses.*

Furthermore, those same *practical considerations* and arguments were before Congress and within its view when the criminal sanctions clause (Section 11) of the Act was amended so as to give the United States District Court exclusive jurisdiction over those who fail to report for duty.⁶ The failure of Congress to provide for denial of the right of defense shows that it rejected such *practical considerations* now urged by the Government.

- (2) *Certain cases relied upon by Government distinguished.*

The doctrine announced in *Houston v. Moore* (5 Wheat. 1, 35) and *Martin v. Mott* (12 Wheat. 19) is invoked by the Government. (Br. pp. 47-48) Those cases do not control here because they concern persons enrolled in the militia and subject to military authority. In those cases the court was not speaking of that class of persons exempt from training and service and beyond the jurisdiction of the militia. With the statements made in and the conclusions reached in those cases we have no quarrel. They are distinguishable from the facts of the case at bar (governed by *Wise v. Withers*, 3 Cranch 331) and are not applicable here.

Even as affecting registrants who are subject to the terms of the Act and not exempt, it is doubted whether *practical considerations* would be sufficient to deny a constitutional right of trial and defense. Such matters of policy and considerations certainly could not justify denial of rights of defense to that class of persons exempted from the process of the local boards. It would not justify submission to the illegal order to report as a condition precedent to urging its invalidity.

⁶ See petitioner's main brief, page 46.

(3) *Defense to indictment is no more harassing than habeas corpus.*

Much stress is placed upon the need to protect the administrative process against harassing litigation. It appears that habeas corpus is available, but the Government raises no objection to that harassing instrument. Habeas corpus directly affects the military organization and has a tendency directly to frustrate the military and naval efforts in training. If the inductee is unsuccessful in prosecuting his habeas corpus action and persists in his claim that he is not subject to military jurisdiction or argues his classification, *after acceptance* in the armed forces, and does not comply with military orders, he is subject to much more severe penalty than could be given him under the Act if he had never reported in the first instance.

(4) *Denial of due process cannot be used to discourage violation of the Act.*

Further, the Government argues that denial of a defense has a tendency to force the men into the armed services, and compliance with the process of the administrative agency does not warrant denial of *due process of law* in the courts. The army is raised to protect the institutions of democracy. Forfeiture of *due process* should not be the cost of increasing the armed forces. In approximately 2500 cases prosecuted under the Act, 1200 of which are against Jehovah's witnesses, the right to a defense has been denied under the *Grieme* rule in violation of *due process*. It cannot be argued that allowing the defense of statutory exemption from duty of training and service would cause registrants subject to the Act to refuse to perform their duty. Only those exempt in fact can rightly and effectively refuse to respond. Citizens and others subject to training and service under the Act must be presumed to do their duty; and if not exempt, it will be presumed that they will report for training and service as required by law.

The argument that allowance of the right to claim due process of law in the courts will open the courts to review *every* classification (resulting in breakdown of the induction process and Selective Service machinery) insults the patriotism and law-abiding nature of Americans and displays weak and little faith in democratic institutions and the ability of the republic, the federal government, to protect itself and the states of the Union in time of peril. A democracy need not turn to totalitarian practice when she calls her men to arms and they draw the sword to war against the foe. It is a fundamental concept of warfare that without a *home front* there can be no *battle front*. In wartime it is equally important to protect the *home front* as it is to sustain the *battle front*.

The Government makes the astonishing argument—a *new theory* in the field of criminal law—that the right to defend must be denied in Selective Service prosecutions so as to discourage increase of registrants' willful failure and refusal to report for induction. Strange it is that this *theory* had not been previously discovered and applied in the trial of murder cases and other atrocious crimes. The argument is patently contrary to the fundamental concept of trial of criminal cases since the common law. It is said that to permit the courts to inquire whether or not one is exempt or whether the board had jurisdiction over the registrant would inevitably lead to the penitentiary. That is doubted, as long as the district courts maintain their integrity and maintain procedural due process while honestly attempting to render justice to the people. Of course, as it is now, with the integrity of the courts broken by the *Grieme* rule, it is impossible for a man to obtain an acquittal under the Act; and naturally his urging the defense of statutory exemption inevitably leads to the penitentiary because he is denied the right to be heard.

The Administrative Order Here Sought To Be Reviewed Is Not Interlocutory But Is Final

Extended argument is made by the Government that the order to report is not a final order and hence cannot now be disturbed by the judiciary. (Br. pp. 54-57) Petitioner's main brief (pages 49-53) sufficiently answers that contention.

According to the Government's theory of the order to report not being a final order to permit judicial review, a person to whom the Act did not apply could be thrown into the administrative machinery, geared and greased as it is for war, and there would be no way under the law for the judicial authority to intervene and rescue the innocent one until *ground up* completely in the administrative machinery.

The entire argument of the Government as to order to report not being final until acceptance on *final-type* physical examination at induction center does not apply to one classed IV-E, who, in every case, is given a final physical examination before the notice to report issues. (Reg. 651.1-651.8) But even if it were the same as process of selection in the case of the I-A classification, the right to defend the indictment could not be affected by failure to report, because a civilian cannot be required to submit to a process that can subject him to military or naval jurisdiction and possible court martial, in order to secure his rights upon the vague, indefinite and uncertain contingency of possible rejection on physical examination. This cannot be made the criterion of determining where military jurisdiction begins and civilian status ends. It has been held that military jurisdiction attaches, not only upon physical examination, but also upon reporting or appearance at the induction center. See the interpretative regulations of the War Department and also *Benesch v. Underwood*, 132 F. 2d 430. The interpretation placed on the Selective Service Regulations as to line of demarcation between civilian status and military status in the process is void because it collides with Section

11 of the Act and defeats the jurisdiction of the United States District Courts under the Act.

The Government's theory of *no final order* was definitely rejected by two dissenting judges of the Circuit Court of Appeals for the Third Circuit: *In the Matter of the Petition of Sam Catanzaro, Jr., for Writ of Habeas Corpus*, decided September 23, 1943. Judge Biggs said: "Nor can I agree with the ruling of the majority that the administrative processes are not completed until, in the language of *United States v. Kauten*, 133 F. 2d 703, 706, 'the army makes its choice' and accepts the registrant for service after he has passed his physical examination. The registrant is in the custody of the military authorities from the moment that he has reported for induction, even though those authorities may see fit to reject him subsequently."⁷

**Petitioner Attacked Decision of
Both Local Board and Appeal Board
By His Plea To Their Jurisdiction.**

The final classification of IV-E was given to petitioner by the local board. (R. 58) On July 15, 1942, one month after action of the appeal board, the local board said: "Reclassified in Class IV-E as per classification recommendation of the Appeal Board." From the record it is clear that the Government's statement that the *final* classification was made by the appeal board rather than the local board is not entirely correct. Cf. Reg. s. 627.26.

The Government argues that since the classification of

⁷ Judge Maris joined with Judge Biggs in the dissent. In this dissent there is to be found an excellent argument in behalf of this petitioner on the question here presented, to wit, the nullity of the order to report, want of jurisdiction of the board and no need to report for induction as a condition precedent to questioning the order. Judge Biggs said: "I see a glaring inconsistency in the proposition that the registrant who obeys an invalid order of his draft board and reports for induction may avail himself of the writ as the means of having the order adjudged a nullity, while the registrant who does not obey a similarly invalid order by reporting for induction and in consequence is arrested may not do so."

IV-E was first made and recommended by the appeal board, and that classification was *de novo*, it is necessary to make an attack against the board of appeal specifically. When the local board accepted the classification of the appeal board and changed the classification from I-A to IV-E it was not necessary specifically to name the appeal board's action in the motion to dismiss, the requested charges, the exceptions to the charge and in the various offers of proof. The attack against the order to report was an attack against the action of both boards because both had denied his claim for exemption as a minister. It was unnecessary to charge either board with prejudice as condition precedent to the attack upon the order to report. If the evidence shows no jurisdiction or that petitioner is exempt, it follows as a matter of law that the boards have violated the law in ordering him to report, regardless of prejudice.

The change in classification from I-A to IV-E does not weaken petitioner's objection that the draft board did not have jurisdiction to induct him. On both I-A and IV-E classifications the local board and appeal board rejected his claim for statutory exemption. The objection, that the local board did not have jurisdiction *to order him to report for induction*, constituted an attack against the action of the local board and the appeal board in rejecting his claim for exemption.

The argument that the action of the appeal board is *de novo*, so as to destroy the assignments of error, is hypercritical, technical and without merit. This extensive argument of the Government may be applicable to the case of an individual subject to the required training and service under the Act but is entirely immaterial in the case of one exempt from duty under the Act.⁸ Falsity of that delusory argument becomes apparent when it is conceded that if the local board did not have jurisdiction to induct petitioner for any service under the Act a mere change of classifica-

⁸ See argument in Government's brief, pp. 58-61; see, also, its brief in *Bowles v. United States* (319 U. S. 33), pp. 36-38, 71-79.

tion from I-A to IV-E by the appeal board or local board would not confer jurisdiction over petitioner.

Petitioner Attacked Decision of Both Local Board and Appeal Board By Offering To Show Denial of Personal Appearance Before Local Board

Offers of proof have been confused by the Government. It says that the offers related to prejudice. The only offer tending to show prejudice on the part of the board was that wherein petitioner sought a personal appearance before the local board, which was denied by the chairman who said that he had 'no damned use for Jehovah's witnesses'. A personal appearance is provided by the Regulations. (Reg. ss. 625.1, 625.2) This action of the local board was a violation of *procedural due process*.*

Since no provision was made for a personal appearance before the appeal board the fact that the appeal board changed the classification from I-A to IV-E did not cure the violation of the Regulations by the local board denying a personal appearance. The only way this could be remedied was by allowing the petitioner a hearing before the local board. It was never permitted.

In the various offers of proof of *documentary evidence* by petitioner it is not contended that the local board refused to receive the evidence. All the evidence offered was in writing and was in petitioner's *cover sheet* or file and was considered by the appeal board and the local board. It was not necessary that petitioner comply with Section 627.12 of the Regulations by sending rejected evidence to the appeal board along with his appeal, because the local board did not reject any evidence offered to it. Therefore the Government's argument, implying that petitioner's offer of evidence was of material rejected by the board, is very misleading and confuses the issues. See Government's brief, p. 60.

* See petitioner's main brief, page 102, footnote 187.

Director of Selective Service Never At Any Time Passed Upon Petitioner's Ministerial Status

Referring to parts of the Selective Service file, the Government says such were not offered by either party in the trial court, and which show that application to have petitioner's name added to the *certified list* was denied by National Headquarters.¹⁰ Petitioner has no objection to this action being drawn to the attention of the court. It is assumed that this court can take judicial notice of the ruling of the Director in this regard.¹¹ However, this action cannot be taken as any indication that the petitioner was not in fact a "minister of religion" according to Section 5 (d) of the Act. The established list was not a determination by the Director that men whose names on it were ordered to be classified as ministers *ipso facto*, but establishment of the list was as a convenience to the administrative branch of the System and to the listed registrant for the handling of appeals, and was not the sole criterion in determining whether one on the list or not on the list should be entitled to a IV-D classification. It must therefore be assumed that the denial of the request to have petitioner's name added to the list is not material.¹²

This court can also take judicial notice of the action of the National Director in June 1942, in advising the State Director, in response to a communication from petitioner,

¹⁰ See Government's brief, pages 10-11, footnote 5.

¹¹ See *Bowles v. United States*, 319 U.S. 33; *Caha v. United States*, 152 U.S. 211, 221, 222; *Thornton v. United States*, 271 U.S. 414, 420; *The Paquete Habana*, 175 U.S. 677, 696.

¹² See petitioner's main brief, pages 92-93; also letter of General Hershey, the Director, as to legal effect of the list, APPENDIX A, *infra*, pages 45-49, this brief; and also quotation from the Government's brief in *Benesch v. Underwood*, 132 F. 2d 430, signed by the Assistant Attorney General and Assistant General Counsel of the Selective Service System, APPENDIX B, *infra*, pages 49-50, this brief.

that there was nothing in the correspondence that would warrant further action by the Director. The Government has properly drawn this fact to the attention of the court. (See Government's brief, page 42, footnote 34.) This action does not constitute a determination by the Director that petitioner was not a minister or not entitled to a IV-D classification from the local and appeal boards. The Director's refusal to take further action is merely a refusal to exercise his discretionary jurisdiction conferred under Section 628.1 of the Regulations. The action was taken on basis of the letter from petitioner to the Director and not on review of his file. Such action is the same as this court's denial of certiorari which "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U. S. 482, 490.

**Whether or Not Petitioner Introduced His Entire File
into the Evidence To Support His Attack
Against the Boards' Jurisdiction is Immaterial**

Petitioner says that it is entirely unfair and improper for the Government to advise the court that there were other parts of the file which were not offered in evidence, unfavorable to petitioner.

The record on file and agreed upon by the petitioner and the Government as a basis for a review of this case does not show that any evidence existed or was in the file which disputed his claim for exemption as a minister. It is doubtful whether this court can take judicial notice of the contents of a Selective Service file, including all immaterial parts, papers, forms, letters, affidavits and documents; especially where the file was not before the National Director in connection with the rulings made by him. For the purposes of determining the sufficiency of the offers of proof of the various pieces of documentary evidence contained in the file, since nothing to the contrary appears, it

must be assumed that the proffered evidence constituted the entire file and all material parts thereof. If the offer was defective because not constituting all the file, the defect should be made to appear in the record. The Government cannot assert to this court, *for the first time*, on a basis of an investigation *aliunde* or *de hors* the record, that all the material parts of the file were not offered. Certainly it was not necessary to introduce any parts of the file which were not material to the classification or claim for IV-D exemption. If there was any unfavorable evidence in the file the Government did not offer it. Cf. *Edwards v. United States*, *infra*.

Moreover, the cases upon which the Government relies as grounds for its contention that everything in the file must be offered do not involve a situation where, as here, there is an inquiry as to whether or not the board had jurisdiction. The petitioner offering the evidence was entirely exempt from the induction process and authority of the administrative system, and the administrative agency had violated the *due process* clause in making its decision. Cases cited by the Government (Br. pp. 61-62) as basis for holding the exclusion of the evidence harmless error do not control here and, if applicable at all in a draft case, would be confined to instances of court review of classifications of persons subject to the Act, and not to instances where there is no jurisdiction. The rule could not apply to the case of one exempt from the Act, as is petitioner. (*Crowell v. Benson*, 285 U. S. 22; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49-54) Furthermore, since the documentary evidence offered by petitioner was excluded on the theory that the trial court *had no authority* to question the action of the local board in ordering petitioner to report for induction, it seems that an offer of a part of the file alone would be sufficient to raise the question. The trial judge specifically held that the offers were sufficient to raise the question when he ruled; "I think this whole matter is covered by your first offer under the rules of court." (R. 38)

If the Government's inference is correct, that this court can take judicial notice of the contents of the *file*, then it is unnecessary to offer any part of the file; and the failure to offer all the file would not militate against documentary evidence offered.

Petitioner says that this court cannot consider and hear *de novo* any new evidence, outside the record, which was not before the district court. The petitioner is entitled to a trial by jury before the district judge. The record made before the trial court should determine his guilt and not new evidence presented here *for the first time*. The anomalous theory of the Government on this point would permit a conviction without evidence or denial of trial in the district court, and then upon appeal to this court the Government could *cure all errors and denial of due process* by submitting to this court *de novo* additional evidence, which in this case, if offered in the court below by petitioner, would plainly have been rejected by the district court on the authority of *United States v. Grieme*, 128 F. 2d 811. It is a fundamental rule that the erroneous exclusion of admissible evidence cannot be converted into harmless error on the theory that the jury would not believe it or because it is thought to be preposterous and unreasonable. Cf. *Edwards v. United States*, 312 U. S. 473.

The Government overlooks entirely the opinions by this court that in criminal cases if evidence is excluded which is material or relevant it is presumed to be prejudicial and reversible error. This is especially true where it is shown that there was no trial, no inquiry and no hearing on the issue to which the excluded evidence related. *Crawford v. United States*, 212 U. S. 183, 203; *McGinis v. California*, 247 U. S. 95.

Bowles Case Not In Point Here

The opinion of this court in *Bowles v. United States*, 319 U. S. 33, does not sustain the Government's position in this case because the facts are altogether different. There the point presented upon the merits was whether only members of a recognized religious sect were entitled to classification as conscientious objectors. Naturally this point became moot upon appeal when it developed that the *order and decision* of the Director (of which the court could take judicial notice, upon an appeal to the Director and investigation by the Department of Justice) decreed and found as a fact that the claim of Bowles was *fictitious and false* and that he was *not in fact* a conscientious objector. No such situation is presented here. The Selective Service System has made no such finding against petitioner's claim as a minister. The undisputed evidence and records of that *System* show that petitioner is a *minister of religion*. If Bowles had presented to this court the proposition that the System erred in finding, as a fact that he was not a conscientious objector, a different question would have been before this court for consideration, which may have prevented a dismissal of the petition for writ of certiorari because the question presented was moot. But the rule in the *Bowles* case can not apply in the case of a minister who has been denied his claim by the National Director in the teeth of evidence showing him to be a minister and recognized by his denomination.

The status of a minister of a denomination *recognized by the Selective Service System* is not nebulous and is easy of determination. Ministerial status does not involve the niceties of conscience and belief and mental attitude as does the status of a conscientious objector. If the rule in the *Bowles* case be held applicable here, because of the action taken by the Selective Service System, then the court should reconsider its ruling in the *Bowles* case on the grounds that it permits the Director to make an *ex parte* ruling that is *supreme* and unimpeachable by a registrant in defense to

an indictment, which denies the defendant his *right of trial* in the United States courts and substitutes in lieu the fiat of the Director in the same manner as does the *Grieme* decision, and would be subject to the same objections urged here against the *Grieme* rule. Again it is urged that it is unnecessary to consider the *Bowles* opinion because it is not applicable here.

**Documentary Evidence Offered Should Have Been Admitted
In Trial Court Regardless of
Whether Issue Was One of Fact or Law**

Another argument that demonstrates the unsoundness of all the Government's contentions is, that the documentary evidence rejected was properly excluded from the record because "self-serving declarations" and as not being the "best evidence" of the matters contained therein. (See Government's brief, page 14, footnote 8.) The answer to both those contentions is that if the local board, the appeal board and the Department of Justice hearing officer considered the affidavits and evidence and made them a part of the file, which they were, then it is not the province of a district court on review to reject them. Under Selective Service Regulations the only sort of evidence that can be received and placed in the evidence is written statements or affidavits. If the strict rule of evidence for trial in judicial proceedings is invoked to exclude evidence adduced before an administrative agency at a hearing reviewing the proceeding by a district judge, then the court should hold that a registrant should have counsel to represent him before the board and also require regulations establishing such rules of evidence.¹³ If the hearing in all cases is not *de novo* in the district court and the court must review the file as in *habeas corpus* cases, then how can the court determine what

¹³ Reg. ss. 623.2, 625.2 (b).

will be considered and what will not be considered in the file? If the "self-serving declaration" objection is sustained as to the material in the file, then the court would be obliged to reject the Questionnaire and Conscientious Objector's forms also, leaving only the notice to report for induction in evidence. By applying the same analogy, a defendant in a criminal case could be denied the right to testify in his own behalf because his statements on the witness stand are 'self-serving'.

The Government also argues that the proffered evidence pertained to a matter of law, to wit, whether the board was without jurisdiction or whether petitioner was exempt from training and service. It is said that such matters are exclusively for the trial judge to determine and were properly excluded from the evidence and consideration by the court below, because not a matter for the jury to determine. (See Government's brief, page 24, footnote 11.)

This argument is specious and falls flat for several reasons. In the first place, if it is a matter of law for the trial judge, it is nevertheless the duty of the trial court to receive the evidence so that the trial judge can consider it. The trial judge cannot consider evidence not in the record and cannot pass upon a question of law that is not presented in the record, and is not to be applied to the facts. To present the question to the trial judge it was imperative that he receive the documentary evidence. Then he could pass on the issue and not until then. It cannot be received *de novo* and for the first time in this court, because this court does not have original jurisdiction in criminal matters. Because it may be said to relate to a *matter of law* did not cure the error of exclusion.

If the issue is established as a matter of law, by undisputed evidence, and no question for the jury is presented, as contended by the Government, then there could not be a judgment of guilt entered in this case. The defendant is entitled to a trial by jury. In criminal law it is beyond the

power of a district judge to take a case away from the jury and instruct a verdict for the Government. So to do would violate the constitutional right of trial by jury. *United States v. Taylor*, 11 F. 470, 471; *Cain v. United States*, 19 F. 2d 472; *Blair v. United States*, 241 F. 217, cert. den. 244 U. S. 655. The only time the judge can take a case away from a jury in a criminal case is when the judge instructs a verdict for the defendant and orders the indictment dismissed. That should have been done in this case; but if the record is not sufficient to warrant that conclusion, it was, albeit, the duty of the trial judge to permit the jury to pass on the question of whether petitioner was in fact a minister as he claimed or whether he had fictitiously (and falsely impersonated a minister before the local board; and the trial judge could not instruct the jury to return a verdict of *guilty* as he did in this case.

**The 'Draft Scheme' as Applied to Jehovah's witnesses
by National Headquarters of the Selective Service System**

Facts concerning Jehovah's witnesses and the *draft* have been viewed by the Government in the same limited scope as the fundamental questions of law. The bad perspective which the Government has of the activity of Jehovah's witnesses under the Selective Training and Service Act has caused it to make certain statements in its brief which cannot go unanswered.

(A)

PETITIONER DOES NOT CLAIM UNFAIR ADMINISTRATION OF THE ACT BY THE EXECUTIVE BRANCH AGAINST JEHOVAH'S WITNESSES

In its brief (pp. 19, 64-78) the assertion that petitioner has charged General Hershey and others of the administrative branch of the Selective Service System with discrimination against Jehovah's witnesses is unfounded. Petitioner does not charge the administrative branch of the system

with discrimination in treatment of Jehovah's witnesses. The charge is that the local and appeal boards have denied the petitioner his claim as a minister. It was the board's duty to classify the petitioner and the duty of the appeal board to correct an illegal classification. Both boards denied petitioner his rights, contrary to law. The administrative branch (National Headquarters and State Headquarters) declined to exercise its discretion in the matter.

The Government is challenged to point out wherein petitioner's brief charges the administrative branch with discriminating in dealing with Jehovah's witnesses.

To operate the system and to administer it is a tremendous task and it is impossible for any such monumental undertaking affecting so many millions of men to be free from error. There is no human device whereby an administrative headquarters of such a prodigious system can be operated so as to keep the local and appeal boards on the same high plane upon which the National Headquarters operates.¹⁴ If the local boards and appeal boards had followed the directives and opinions of National Headquarters concerning Jehovah's witnesses, there would not have been such a great number of cases of "injustices" committed against Jehovah's witnesses. These injustices cannot be and are not attributed to the administrative headquarters of the system. It is impossible to guarantee a determination of the many cases in a manner equivalent to the determination of judicial causes by the courts, because the local boards are composed of men untrained in law, such as the 'butcher, the baker and the candlestick maker'. The appeal system is not adequate to guarantee due process of law. The appeal scheme is not on a par with the judicial appeal of the state and federal judiciary. Mistakes will inevitably result in the operation of the Act under the system, and there must be a review allowed in the courts to protect the citizens against

¹⁴ See letter from General Hershey, APPENDIX A, *infra*, pages 45-49.

abuse, and especially for that class of persons exempt from training and service under the statute.

(B)

ANALYSIS OF CERTIFIED OFFICIAL LIST OF JEHOVAH'S WITNESSES PROMULGATED BY NATIONAL HEADQUARTERS OF SELECTIVE SERVICE REVEALS FALSITY OF GOVERNMENT'S CHARGE OF ABUSE

Concerning the list certified by National Headquarters to State Headquarters, it should be noticed that this list did not include all male pioneers of the Watchtower Bible and Tract Society. In view of the fact that the Selective Training and Service Act in June 1941 required training and service only of individuals between the ages of 21 and 35, the Selective Service System, National Headquarters, specifically required that the names to be included on the list submitted be confined to men between the ages of 21 and 35. Pursuant to that request, a list was prepared and submitted containing 951 names. It did not include pioneers above the age of 35 or under the age of 21.

It is noticed that the list of February 20, 1942 contained the names of 790 (actually only 789). This decrease was due to the removal by the Society of 187 names of such individuals who failed to maintain the high standard established by the Society in harmony with the agreement between it and the Selective Service System as a condition for keeping a man's name on the pioneer list. Shortly after the list was completed in June 1941, it was anticipated that new pioneers would be added to the list. It was necessary to establish a policy in regard to adding new names to the administrative instrument, to wit, the certified official list. Those standards were fixed by the Selective Service System and later pronounced by letter dated October 18, 1941, signed by Lt. Col. Carlton S. Dargusch, Deputy Director.¹³ Between June 1941 and February 20, 1942, the names of

¹³ APPENDIX C, *infra*, pages 50-51, this brief.

25 new pioneers were added by National Headquarters upon application of the Society, making a total of 789 names on the list as of February 20, 1942, the date that the second list was certified to State Headquarters.

The list grew from 789 names in February 1942 to 1026 names in December 1942. This large increase was attributable almost exclusively to the broadening of the age bracket of men liable for training and service under the Act by amendment raising the age from 35 to 45. Among the pioneers of Jehovah's witnesses who registered in February 1942, pursuant to Presidential proclamation, 205 of them were on the pioneer list prior to June 1941 and, pursuant to an agreement with National Headquarters, they were considered eligible for automatic addition to the list as of June 12, 1941.¹⁶ During July 1942 National Headquarters automatically added to the list the above-mentioned 205 pioneers. From January 1942 to December 1942 the names of 94 new pioneers were added to the list. During this same period of time the Society, pursuant to agreement to maintain strict standards, dropped from the pioneer list the names of 62 men, which names were deleted from the certified list on information provided by the Society. During this time there was a net increase of only 32 names in the list.

¹⁶ See letter dated April 21, 1942, addressed to Lt. Col. Carlton S. Dargusch, National Headquarters, APPENDIX D-1, *infra*, page 52, this brief; and letter dated May 19, 1942, addressed to Commander P. H. Winston, National Headquarters, APPENDIX D-2, *infra*, pages 53-54, this brief.

Below is shown a table of the history of the certified official list, giving a summary of the action taken by National Headquarters concerning deletions and additions to the list made upon information furnished by the Society. The table is compiled from records of the Society and correspondence to and from National Headquarters. The Government is challenged to impeach it or to prepare a counter-table of figures sustaining the contention that the list swelled overnight, as claimed in the brief filed by the Government.

[A]

| | |
|---|-----|
| <i>Original</i> certified official list, names | 951 |
| 1. Names of new pioneers added on application from June 1941 to February 1942 | 25 |
| 2. Names dropped by Society because of failure to maintain standards | 187 |
| 3. Total remaining after above additions and deletions | 789 |

[B]

| | |
|--|------|
| <i>Second</i> certified official list, names | 789 |
| 1. Miscellaneous additions on separate applications from January 1942 to September 1942 | 16 |
| 2. Addition by joint order April 22, 1942 | 20 |
| 3. Addition by joint order May 15, 1942 | 14 |
| 4. Addition by joint order June 5, 1942 | 20 |
| 5. Addition by joint order July 1942 | 21 |
| 6. Miscellaneous additions October 1942 | 3 |
| 7. Total additions | 94 |
| 8. Names dropped from list by Society from January 1942 to December 1942 because of failure to maintain standards | 62 |
| 9. Net increase in list | 32 |
| 10. Automatic addition of pioneers on Society's pioneer list before June 1941, who were included in increase of age bracket by amendment of Act, and added to the list as of June 12, 1941 | 205 |
| 11. Total names on list December 1942 | 1026 |

[C]

| | |
|---|------|
| <i>Third</i> certified official list, names | 1026 |
|---|------|

The statement on page 71 of the Government's brief, that "the volume of applications became so great that it was impossible to pass upon each one individually", is not accurate. The change of policy was not due to an overnight increase of new pioneers, as charged by the Government. The method of investigating each new application to be added to the list through the local boards put a heavy burden upon the limited stenographic force and personnel of the section of Selective Service National Headquarters having charge of "religious bodies"; but the real reason for the change was that the policy of investigation and addition to the list upon the move of National Headquarters through the local boards caused strife and objections to be raised on the part of some local boards that the National Headquarters was encroaching upon the "original" jurisdiction of the local boards on matters of classification; and it was then considered more appropriate to let each new pioneer handle the matter individually with his local and appeal board, subject to the right of appeal to the President or application for discretionary review by the Director. It is not accurate for the Government to assert that the list increased and mushroomed overnight and to imply that it was used as a means of evading the draft.

It was never the policy of the Selective Service System to say that only those persons named on the list would be entitled to classification as ministers and entitled to claim exemption from training and service as provided by the Act. (See pages 25, 33-36, *supra*, and APPENDIX A, *infra*, pages 45-49.)

(C)

ANALYSIS OF RECORDS OF WATCHTOWER BIBLE AND TRACT SOCIETY REVEALS FALSITY OF GOVERNMENT'S CHARGE OF UNDUE INCREASE IN ITS ROLL OF FULL-TIME MINISTERS

The records show that there has not been an extraordinary increase or 'mushroom' development or increase in the pioneers or Jehovah's witnesses generally on account of the draft. The growth of the organization and the increase of its ministers have been natural and in proportion to the increase of previous years.

From examination of the records of the Watchtower Bible and Tract Society it is established and counsel asserts that 52 percent of all pioneers are women; 16½ percent are men over 38 years of age; and 31½ percent are men under the age of 38, many below 18. These percentages have been prepared by counsel upon an investigation and compilation of the record of all pioneers of the Society.

A list of figures taken from the *Yearbooks* and Society's records is set forth below, showing the proportionate increase in pioneers, company publishers, and attendance at the annual conventions of Jehovah's witnesses.

| YEAR | PIONEERS | COMPANY PUBLISHERS | CONVENTION ATTENDANCE | YEARBOOK |
|------|----------|--------------------|-----------------------|--------------------|
| 1932 | 1,997 | | | 1933 p. 50 |
| 1933 | 1,976 | 16,058 | | 1934 p. 43 |
| 1934 | 1,976 | 18,967 | 15,000 | 1935 pp. 41, 48-49 |
| 1935 | 1,829 | 20,786 | 20,000 | 1936 pp. 53, 55 |
| 1936 | 1,831 | 21,415 | 25,000 | 1937 pp. 68-69, 75 |
| 1937 | 1,838 | 21,689 | 30,000 | 1938 p. 56 |
| 1938 | 1,910 | 25,596 | 65,000 | 1939 pp. 59, 74 |
| 1939 | 2,176 | 35,466 | 75,000 | 1940 pp. 56, 69 |
| 1940 | 2,686 | 47,762 | 79,335 | 1941 pp. 71, 90 |
| 1941 | 4,049 | 56,745 | 115,000 | 1942 pp. 42, 59 |
| 1942 | 5,290 | 62,179 | 129,699 | 1943 pp. 39-40, 68 |

The Government would have the court led to the belief that the Society did not actually consider the total number of pioneers and company publishers as ministers

during those years; but that the Society "recognized" only those whose names appear listed in the *Yearbooks* for those years. (See Government's brief, pp. 74-75, footnote 68.) The list of names in each issue of the *Yearbook* is not a true criterion to apply and has never been considered by the Society as limiting the ordained-minister status of other of Jehovah's witnesses. The list of names published each year in the *Yearbook* consists only of those persons who are recognized by the Society as elders and sent forth as traveling supervising ministers to visit the various congregations of Jehovah's witnesses, with power of visitation, to check records, settle disputes, supervise preaching activity, and report generally the condition of the congregations to headquarters. In this sense the list comprises only special representatives who occupy a status analogous to bishops of "recognized" orthodox sects of religion.¹⁷

It is interesting to note how the Government has treated the above figures in its brief. From the year 1932 to 1939 the figures employed in its discussion (Brief, page 75, footnote 69) were *averages*. But when the Government comes to consider the year 1940 to 1941 it abandons the *average* number of pioneers in full-time service and seizes hold of the month of each year where the highest number of pioneers is shown to have reported. Why did not the Government use the same gauge when it reached 1940?

This change in standards of calculation is employed by the Government to bolster its factitious conclusion that there has been an overnight influx of men into the pioneer work on account of the draft law. It is noticeable that the increase during all the years has not changed the percentage of women engaging in this work, which has always been

¹⁷ Compare the language of 1943 *Yearbook*, page 18, to wit, "There are many other ordained ministers of Jehovah's witnesses whose names are not listed in this year's report, but those that are listed are specially equipped to look after their ministerial duties at the headquarters of the Watch Tower Bible and Tract Society or its branches or as traveling evangelists."

higher than 50 percent. There could be no objection to the Government's use of the "high" figures of the years after 1940 if it had used the "high" figures of each year before 1940.

The apathy of the Government to records and figures concerning the normal and gradual increase of pioneers reaches a climax when the number of pioneers for the year 1942 is considered and discussed. Blind to the *Yearbooks* before it, showing the figures and from which it quoted as authority, the Government says that there was a "total increase during 1942 alone of 5,052 in the number of pioneers, an increase of nearly 100 percent." The actual difference between the *average* totals of pioneers for the year 1941 and 1942 is 1241, or an increase of approximately 25 percent. In its frenzy the Government *overshoots* the mark by 75 percent so as to sweep the court into the conclusion that there was a 100 percent increase during the year 1942, contrary to the facts and the fundamentals of arithmetic. This effort on the part of the Government leads to preposterous results. If there were 5,463 pioneers at the end of 1941 an increase of 5,052 would make a total of 10,515 pioneers at the end of 1942. The records do not support this conclusion. The highest number of pioneers reporting for any one month during the year 1942 was 5,742 for the month of September, which is the last month of the fiscal year. At the end of the year 1941 there were only 5,463 pioneers (1941 *Yearbook*, page 46), or a difference of 289. The figures for the last month of each fiscal year cannot be taken as a criterion of the average increase. A check of the Society's records shows that the difference between the highest figures of each year and the average is accounted for by the fact that many children of high-school age during summer vacation from school engage in the work as full-time pioneers and at the end of their vacation must return to school; and also, a large number of adults who follow seasonal avocations pursue full-time pioneer activity during the time

they are not engaged in such seasonal secular occupations. The average number of pioneers for 1941 was 4,049; and for 1942, 5,290, or a difference in averages of 1241 pioneers. The Government's excuse for this enormous statement is based upon the 1943 *Yearbook* at page 44, where it is said that there was an average monthly increase of 421 pioneers. The *Yearbook* does not say that this was a progressive monthly increase, but that during each month of the year 1942 there was a *monthly average* of 421 general pioneers above the total corresponding monthly average in the field during the previous year.

In connection with the statement in the Government's brief (page 71, footnote 62), that the Selective Service System had established an estimate that allowance be made for an increase in pioneers of from 50 to 80 per year, it appears from the records that such a limitation was unduly harsh. The National Headquarters did not issue a ruling that Jehovah's witnesses would be limited to this number of new pioneers per year. This pertained only to the increase of the number on the certified list, an administrative instrument. No definite conclusion was reached and no order was made and published to Jehovah's witnesses as to any number to be fixed to limit the additions to the list. While conferences and negotiations were going on between the Society and the Selective Service Headquarters in an effort to agree upon a fixed number for an annual increase of the list, the policy of adding names to the list was discontinued and the question of the number to be limited became moot.

Only by doing violence to the presumption of innocence and drawing false or factitious conclusions from the record can it be inferred that petitioner's entry into the pioneer work in 1940, two weeks before the adoption of the Act; was not for a noble purpose and in good faith. Indeed the presumption of innocence and the absence of any evidence in the record to impeach his move to join the pioneer work

at that time impels the conclusion that petitioner stands on the same plane as those who may have entered the ministry years before. To do otherwise would be to give *ex post facto* effect to the law contrary to the Constitution. It is noticed that in the Act provision is made for exemption of students preparing for the ministry as well as ministers.

Whether petitioner was a part-time minister prior to September 1940 is immaterial and does not work against his legal rights. He was a minister, even before September 1940. He merely obligated himself to devote more time to field service by becoming a pioneer. The 150 or 175 hours per month spent in preaching is actual house-to-house preaching. It does not include time used for current preparation, current study for conducting Bible classes, making out daily reports, etc. Ministers of orthodox religions do not spend that many hours actually preaching. After a brief sermon once or twice on Sunday and once or more times during the week the rest of the time the orthodox ministers may devote to personal matters, etc., as they see fit. The preaching time spent by the orthodox clergy compares more nearly to the time spent by the part-time minister of Jehovah's witnesses in actual preaching.

Obligations of the ministry for one of Jehovah's witnesses includes preaching until death or until Jehovah's battle at Armageddon. Of and concerning the preaching of this gospel in all the world for a witness unto all nations, Jesus says: "The harvest truly is plenteous, but the labourers are few; pray ye therefore the Lord of the harvest, that he will send forth labourers into his harvest." (Matthew 9:37, 38; 24:14) That directive of the Master for a *specific* prayer remains effective during wartime as well as in peacetime. The Society and Jehovah's witnesses cannot stop their preaching or the increase of their preaching in time of war or in time of peace. Surely the Government does not desire to oppose the preaching activity of Jehovah's ministers by imprisoning them. Such work and its in-

crease will continue after this war—after suspension or repeal of the Selective Training and Service Act. The constant increase is not due to the war but to Jehovah God, who *gives* the increase, as it is written:

“Who then is Paul, and who is Apollos, but ministers by whom ye believed, even as the Lord gave to every man? I have planted, Apollos watered; but *God gave the increase*.”—1 Corinthians 3:5-7; cf. Psalm 127:1, 2; Isaiah 9:6, 7; 40:28-31.

It has ever been the policy of the Watchtower Society to encourage increase in the rank of full-time pioneer ministers. Every one of Jehovah's witnesses desires ultimately to devote his entire time and life to preaching the good news of God's Kingdom, whether in summer or winter, war or peace. Because of the shortness of time to give a worldwide witness, each one of Jehovah's witnesses, whether a part-time or full-time minister, *always* has been and is encouraged to put more time into the *service* and not because of war conditions. (Matthew 24:14) By each one devoting more time to preaching he is 'provoking willing hearers to love and good works, . . . exhorting, and so much more' as THE DAY approaches.—Hebrews 10:24, 25; see, also, 1 Peter 4:7-11.

Conclusion

A review of the annals of Anglo-American criminal trial jurisprudence since the proclamation of Magna Carta will not reveal a case where due process and the fundamental rights of a defendant charged with crime have been so grossly flouted and violated by the prosecutors and the courts as in the proceedings in this case. It will be conceded by all that under the statute, at some stage of the proceedings, petitioner has a right to be heard on his claim that he is exempt from the terms of the statute. But when all is “said and done” a reflection will reveal that this and all other

defenses have been denied to him in these proceedings. The Government has been unable to explain why this admitted denial of due process of law in this criminal proceeding should be approved by this court.

The Government's argument, if accepted, would revamp and reconstruct a necessary and valid act of Congress, making of it a monstrous armored machine of prosecution, geared at such high speed that its operators cannot see the plainest guide posts and highway signs along the procedural road built through centuries of carefully considered criminal jurisprudence. Hurting petitioner headlong through the "judicial process", the Government's titanic machine reaches this court, the last bulwark of law and liberty. It heads straight for the supporting pillars of the juridical edifice, carrying in its wake the sanction of almost every federal tribunal inferior to this august forum.

Squarely confronting this Court is the all-important question: Will this free land's ranking judicial officers step aside now to mollify the "practical considerations" and *policy* arguments of the executive department that was created by its sovereign people, and allow the pillars of due process to be mangled, shattered to bits as by a 'juggernaut', with the resulting impact crashing the house of judicial protection within which dwell all inhabitants of America?¹⁸

To stop and permanently turn aside the threatening inrush of alien legal precepts, and to avoid a perpetuation of judicial blunders of the inferior federal courts in prosecutions under the Act which "seriously affect the fairness, integrity or public reputation of the judicial proceedings"¹⁹

¹⁸ Consider *The American Doctrine of Judicial Supremacy* (C. Grove Haines), revised edition, *passim*.

¹⁹ *Johnson v. United States*, *supra*.

it is necessary to reverse the judgments below and let a judgment be entered dismissing the indictment or, in the alternative, remanding the cause to the district court for a trial in accordance with the law of the land of liberty.

Confidently submitted,

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT

Counsel for Petitioner

APPENDIX A

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
WASHINGTON, D. C.
July 7, 1943

IN REPLYING ADDRESS
THE DIRECTOR OF SELECTIVE SERVICE
AND REFER TO NO.
1-6.26-77

Mr. Hayden Covington
117 Adams Street
Brooklyn, New York

Dear Mr. Covington:

May I acknowledge receipt of your letter of June 19, the purpose of which was to recommend to me that I take summary action against Local Board No. 133, Brooklyn, New York. In your correspondence you have made an effort to establish proper grounds for my taking such action

through an analysis of the policy of this Headquarters with regard to registrants who are members of Jehovah's Witnesses. The basis for your recommendation is that Local Board No. 133 has undertaken to reclassify from Class IV-D to Class I-A members of the Bethel Family of Jehovah's Witnesses. I hasten to advise you that the premises upon which you base your recommendation are not consonant with our philosophy and our interpretation of the law, and I feel that we should make certain statements in this regard.

The Selective Service System is divided into two distinct branches which, for want of better terms, we will call operational and administrative. The operational branch of Selective Service consists primarily of the local boards, boards of appeal, and Presidential appeal. The administrative branch of Selective Service consists primarily of National Headquarters and State Headquarters.

With regard to the operational branch, the Selective Training and Service Act of 1940 provides as follows:

"There shall be created one or more local boards in each county or political sub-division corresponding thereto of each State, Territory, and the District of Columbia. . . . Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

The operational branch of Selective Service has the power of determining classification of registrants affecting their inclusion for, or exemption or deferment from, training and service.

The administrative branch of Selective Service has no authority to classify individual registrants but rather promulgates rules and regulations prescribed by the President, and generally administers to the conduct of the Selective Service System as a governmental agency.

The Selective Service Act provides that regular or duly ordained ministers of religion shall be exempt from training and service but not from registration under the Act. In Selective Service Regulations there is an assisting definition with regard to the terms "regular minister of religion" and "duly ordained minister of religion."

This Headquarters was advised that all persons adhering to the principles of Jehovah's Witnesses considered themselves as ministers of religion and, therefore, entitled to exemption. Local boards and appeal agencies, however, did not classify all Jehovah's Witnesses as ministers of religion. In due time the Watchtower Bible and Tract Society, through you, presented this matter for consideration of this Headquarters. You were informed of the opinion of this Headquarters that the Watchtower Bible and Tract Society and Jehovah's Witnesses could be considered as included under the phrase "recognized church, religious sect, or religious organization." You were, however, informed that this Headquarters did not agree that all persons subscribing to any religious belief could be considered as ministers since this was considered ~~contrary~~ to the normal concept and to our concept of ecclesiastical organization. We did feel, however, that Jehovah's Witnesses, being a religious organization, would be entitled to consider some of their members as ministers. We were willing to express this opinion to the Selective Service System and, in order that you might indicate a reasonable number of those who were recognized by your organization as ministers, you were privileged to submit a list of such persons to this Headquarters.

We received the list which you submitted and made it

available to the Selective Service System. At the same time we promulgated National Headquarters Opinion No. 14 generally with regard to Jehovah's Witnesses as an organization and to its members with reference to the list which you had submitted and which was made available to the System. National Headquarters Opinion No. 14 is no more than its title implies, an administrative opinion of National Headquarters with regard to members of Jehovah's Witnesses. The official list of Jehovah's Witnesses is no more than information from National Headquarters as to those members who, within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers. Contrary to your contention, this opinion and list do not constitute "settled principles of law" and do not erect a barrier beyond which the discretion of the local board cannot be exercised. A local board may, in any individual case, substitute its opinion for a general opinion of National Headquarters. Incidentally, and to answer your statement, local boards are not compelled to furnish legal foundations and detailed analyses of the reasoning leading to classification decisions.

Not only in the instant case, but in all cases of classification, information and opinions of National Headquarters bearing upon the classification of registrants are subject to a contrary determination by local boards and appeal agencies. Under the law there is no person, including the Director, who can make decisions of classification binding local boards on "questions or claims with respect to inclusion for, or exemption or deferment from, training and service." Upon such questions the decision of the local board, subject to appeal, is final. Administrative determinations of a purely procedural nature may bind local boards where they do not encroach upon the legal provinces of such boards.

Action may be taken by the administrative branch requesting reopening and reconsideration of a case, taking

an appeal, postponing an induction, or requiring other similar action. This does not constitute a determination of the merits of a particular case but merely brings into play certain administrative procedures.

You may expect from this Headquarters a continued administrative consideration of your problems. We are willing to consider for administrative action any individual cases which you may desire to present and which warrant such procedures. We cannot, however, subscribe to your view that we have, by our opinion or by the official list, deprived any of our local boards or appeal agencies of the authority to determine questions in instances where that authority resides in the local boards and appeal agencies under the provisions of the Selective Service Act.

Sincerely yours,

LEWIS B. HERSHEY, *Director*

APPENDIX B

Excerpts from Brief of the Appellee in *Benesch v. Underwood*, No. 9271 United States Circuit Court of Appeals for the Sixth Circuit. At page 15 of that brief, footnote 9, *inter alia*, reads:

"The list at National Headquarters was established for the reasons set forth in General Hershey's opinion of June 12, 1941 (R. 14-18), i. e., primarily because (R. 15) 'The unusual character of organization of Jehovah's witnesses renders comparison with recognized churches and religious organizations difficult.'"

Quoting from pages 17 and 18 of the brief:

"Again, while ministers are exempt from training and service, the decisions of the local draft boards on all claims for exception are, by statute, made final, subject only to review by appeal boards established in accordance with the Act. Consequently, the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters

would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards. Consequently, assuming, *arguendo*, that National Headquarters may have been persuaded by the local board's letter to exclude his name, that fact may not be said to have been unfair or prejudicial to Benesch."

APPENDIX C

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
WASHINGTON, D. C.
October 18, 1941.

IN REPLYING ADDRESS
THE DIRECTOR OF SELECTIVE SERVICE
AND REFER TO NO.
1-10.18-77

Mr. Hayden Covington
117 Adams Street
Brooklyn, New York.

Subject: Additions to list of
Jehovah's Witnesses.

Dear Mr. Covington:

We have received and there are now pending in this Headquarters, a number of requests that names be added to the certified list of members of the Bethel Family, Pioneers, etc. Those requests will be considered as they have now been submitted unless, in individual cases, this office may request further information.

With respect to future requests, we will require that there be submitted the following minimum documents in each case:

1. Application of the Watchtower Bible and Tract Society, Inc., that the name be added to the certified list on file in this Headquarters.

2. Affidavit of the Secretary of Evangelists or some other comparable official of the Watchtower Bible and Tract Society, Inc., to the effect that the qualifications of the individual have been inquired into, that he appears on the records as a member of the Bethel Family, Pioneer, etc., the date when his name was placed on such records, and reasonable detail as to his functions and duties.

3. Affidavit of the individual himself with respect to his ministerial training, his ministerial duties, his secular occupation, and the number of hours per month devoted by him to ministerial work.

4. Affidavit from some friend, neighbor, or associate with respect to the individual's activity in ministerial work, and the fact, if it be so, that the individual is recognized as having a standing, in the relationship to the organization and to the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers in other religions, and that such individual spends all or a substantial part of his time in the work of Jehovah's Witnesses.

In the application it is necessary that there be set forth the individual's full name, address, local board, city, county, and state of the local board, and the individual's Selective Service order number.

For the Director,
CARLTON S. DARGUSCH
Lt. Colonel, JAGD
Deputy Director

APPENDIX D-1

LAW OFFICES OF
HAYDEN COVINGTON
BROOKLYN, NEW YORK

April 21, 1942

Lt. Col. Carlton S. Dargusch,
Deputy Director, Selective Service,
Washington, D. C.

Dear Colonel Dargusch:

At the February registration, a great number of men who have been on our pioneer list and members of the Bethel Family for many months and years, were required to register.

I assume that, pursuant to our conversation of December 31, 1941, regarding such registration, these men will be automatically added to the old list without individual application having to be made in behalf of each.

The Society has obtained from each one so registering his full name as registered, his local board number and address, which information, together with the date of appointment as full-time worker, is shown on the face of the enclosed list and it is hoped that upon a consideration thereof you will find the same sufficient to act on the name of each individual appearing on the list.

I also assume that you will desire that an additional list be submitted of the individuals that are required to register this month, between the ages of 45 and 64. Kindly consider and advise.

Yours sincerely,

HAYDEN COVINGTON

PS: Colonel Dargusch: Original and one carbon of the above letter sent you previously, but without new lists, which are attached hereto.

APPENDIX D-2

LAW OFFICES OF
HAYDEN COVINGTON
BROOKLYN, NEW YORK

May 19, 1942

Commander P. H. Winston,
Selective Service System,
Washington, D. C.

Dear Commander Winston:

This letter serves as a memorandum of our conversation on May 12, 1942, in reference to Jehovah's witnesses.

With reference to the list forwarded to your office containing names of members of the Bethel Family and pioneers required to register on February 16, 1942, which the record shows to have been on the pioneer or Bethel Family list as of June 12, 1941, each will be automatically admitted to the certified list. However, as to such whom the record shows not to have been in such full time service on or before June 12, 1941, but who have been so engaged since such date, it will be necessary for this office to submit the customary application with accompanying affidavits from each applicant, to have any individual's name certified to various State Headquarters.

Such applications will be supplied to your headquarters in due season.

You will notice that opposite the name of each person, the date of which each was admitted to full time status is shown. This will enable you to separate those automatically entitled to be added to the certified list from those applicants for whom applications must be filed. If the list is not in a satisfactory form, advise. Kindly acknowledge.

In order that injustices be avoided pending the determination of all pending applications for certain of Jehovah's witnesses to be added to the certified list, I understand that the National Headquarters of Selective Service System will forthwith issue to the local boards having jurisdiction over each registrant in each application an order to suspend any action with reference to or upon the registrant's classification until National Headquarters has determined whether or not the particular registrant will be added to the certified list.

The need for an order of this nature in each case is that oftentimes the board may not recognize the registrant's request to suspend action in his case and may proceed to order him to report for induction or take other steps which would injure his status under the Selective Training and Service Act and frustrate his application to be admitted to the certified list.

Yours sincerely,
HAYDEN COVINGTON

copy—Major Edward S. Shattuck

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1055

NICK FALBO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania in one count charging that, having been classified as a conscientious objector and having been placed in Class IV-E by his local board; he wilfully failed and neglected to perform duties required of him under the Selective Training and Service Act of 1940 and regulations promulgated thereunder, pursuant to his assignment to work of national importance (R. 82-83). He filed a plea in abatement on the grounds that he had been a "regular minister of religion" since 1931 and a "duly ordained minister" since September 1, 1940, and

was therefore exempt from training and service, and that the court was without jurisdiction because he had valid reasons for having failed to perform the duty required of him, namely, that the local board had wrongly classified him and had acted arbitrarily and capriciously and in violation of the Selective Service Regulations (R. 3-4). The plea was overruled (R. 9).

At the trial before a jury (R. 8), the clerk of the local board testified that petitioner was classified in "Tentative 1" by the local board on August 25, 1941 (R. 11); that he appealed this classification on January 26, 1942, and was classified 1-A by the board of appeal (R. 11-12); that he "again submitted evidence" to the board of appeal and asked that his file be returned to that board; and that on June 17, 1942, the board of appeal classified him 4-E, as a conscientious objector, by a vote of four to nothing (R. 12).¹ In accordance with the directions of the State Director of Selective Service, the local board notified petitioner on August 21, 1942, that he had been

¹ The testimony of the clerk does not conform in all respects with the notations appearing on page 8 of petitioner's Selective Service Questionnaire, which was introduced in evidence (R. 11, 13). According to these notations petitioner was classified 1-A by the local board on January 19, 1942. His notation of appeal is dated January 26, 1942, and the action of the board of appeal in classifying him 1-A is dated January 24, 1942. The minute of this action by the board of appeal states that it was "subject to question of conscientious objection" and that the case was referred to

assigned to work of national importance under civilian direction at Civilian Public Service Camp No. 46 at Big Flats, New York, and ordered him to report to the local board on September 2, 1942 (R. 13-14, 59). Petitioner failed to report as ordered (R. 15).

In his Selective Service Questionnaire petitioner stated his occupation to be " 'Pioneer' for Watchtower Bible and Tract Society," that he worked as a " 'Minister' Preaching the Gospel of God's Kingdom," that he had had 11 years experience in this work, and that he received no earnings from it (R. 52). He also stated that he had worked as a clerk selling clothing from 1937 to 1939 (R. 54). In the section of the questionnaire provided for ministers and students preparing for the ministry, he claimed that he had been a minister of religion of the Watchtower Bible and Tract Society since July 1, 1930, that he was formally ordained by the Society on that date, and that he customarily served as a minister (R. 56). In addition, he stated that by reason of religious train-

the Department of Justice on that date. Following his classification in Class 4-E by the board of appeal on June 17, 1942, the local board reclassified him 4-E on July 15, "as per classification recommendation of the Appeal Board" (R. 58). The notation of reclassification in Class 4-F appearing at the bottom of page 8 (R. 58) is dated January 5, 1943, which was subsequent to the trial and judgment of conviction (R. 8, 80-81). Petitioner was apparently reclassified 4-F because of his conviction. See Selective Service Regulations, Secs. 622.61, 622.62.

ing and belief he was conscientiously opposed to participation in war in any form and he therefore claimed exemption from combatant training and service (R. 56). Finally, he stated that in his opinion his classification should be 4-D, as a minister (see Reg. 622.44 (a)) (R. 57).

In his own defense, petitioner testified that he had been a "regular minister" of Jehovah's Witnesses from 1930 until September 1, 1940, when he was appointed a "Pioneer minister" (R. 23-24). He was permitted to introduce in evidence, limited to the purpose of showing that he was a conscientious objector (R. 26-28), the special form for conscientious objectors which he filled out and filed with the local board (R. 63-66), to which he attached a document entitled "My Statement" (R. 69-70), and a certificate issued by the Watchtower Bible and Tract Society stating that petitioner was an "ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and is therefore one of Jehovah's witnesses" (R. 67). In the form, petitioner claimed exemption from participation in any service under the direction of military authority (R. 63). His statement set forth that he was recognized by the Watchtower Bible and Tract Society "as a full-time publisher known as a 'Pioneer,'" and elaborated the creed of Jehovah's Witnesses, concluding with a request "for classification (4-D) for complete exemption" (R. 69-70).

The court excluded as having no bearing on the issues in the case another certificate issued by the Watchtower Bible and Tract Society on October 7, 1941, declaring that petitioner was a "duly ordained minister of the Gospel * * * authorized to represent the Society and preach 'this Gospel of the Kingdom,' proclaiming the name of Jehovah God and Christ Jesus his King" (R. 29, 71)....

Petitioner offered to prove that—

When the defendant went down to the Board to have his hearing—the Local Board under which he was registered—four members were present, and when he announced that he was one of Jehovah's Witnesses one of the Board members, who is a minister, or purports to be, said, "I do not have any damned use for Jehovah's Witnesses." He attempted to produce evidence by affidavits from the Watch Tower Bible and Tract Society and from his work that he had done, as well as the scriptural authority from the Bible, and the Board stated, "We have no time to listen to this," and he was dismissed. [R. 33.]

In addition, petitioner offered to prove that he was reputed to be an ordained minister of religion; that he was a "Special Pioneer" appointed by the Watchtower Bible and Tract Society and was required to devote 175 hours per month to his work; that he regularly conducted Bible study classes and engaged in house to house work; and that at all

times since his registration under the Selective Training and Service Act of 1940 he spent his entire time in ministerial work (R. 35; see also R. 36-37). This proffered evidence was excluded as irrelevant (R. 33, 35-36).²

In his charge the trial judge instructed the jury, *inter alia*, that petitioner's classification in Class 4-E as a conscientious objector was binding upon the court and jury, and that if petitioner

² The court also excluded the following documents which petitioner offered: petitioner's letter to the local board dated September 8, 1942, in response to the Board's notice to him of suspected delinquency (R. 31, 61), in which petitioner requested the board "to reconsider my case and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV-E" (R. 30-31, 62); a letter from the Watchtower Bible and Tract Society, dated May 21, 1942, addressed to M. W. Acheson, the hearing officer of the Department of Justice who heard petitioner's claim for exemption as a conscientious objector (see Sec. 5 (g) of the Selective Training and Service Act of 1940, 50 U. S. C. Appendix 305 (g)), concerning petitioner's standing with the Society (R. 29-30, 77); a statement signed by petitioner outlining his standing with the Society and requesting reclassification as a minister (R. 30, 72) (this statement bears no date and is addressed "To whom it may concern;" it is marked as an exhibit in the hearing before Mr. Acheson and apparently was submitted to him (R. 72)); a statement concerning his work which petitioner gave to an agent of the Federal Bureau of Investigation (R. 31-32, 78-79); and three affidavits of other persons, dated in May 1942, stating that petitioner was a "Pioneer" for the Society (R. 30, 73, 74-75, 76). Apart from the question of their relevance to the issues, the *ex parte* affidavits were properly rejected as not being the best evidence of the matters contained therein (R. 30).

had any legal objection to his classification he could have had it judicially determined by reporting to the local board and then applying for a writ of habeas corpus (R. 41). Petitioner's exceptions to the charge (R. 42) were overruled, as were his requested instructions that the jury should acquit if they found that the "Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing" (R. 42), or if they found that petitioner was "a regular and/or duly ordained minister of religion, and that the Local Board and Board of Appeals had knowledge of this from the evidence presented" (R. 42-43).

Petitioner was convicted (R. 43, 80) and he was sentenced to imprisonment for five years (R. 48, 80-81). On appeal to the court below, the conviction was affirmed (R. 100-101) on the authority of the earlier decision of the court in *United States v. Grieme*, 128 F. (2d) 811, in which the court held that "The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary or capricious manner are not defenses to a prosecution under the Act for a failure to comply with the board's order" (p. 815).

ARGUMENT

In his petition for a writ of certiorari, petitioner seeks to raise the question whether, in the criminal prosecution for failure to respond to the

order to report for work of national importance, he had a right to assert as a defense that he was a minister of religion and therefore exempt from training and service under the Selective Training and Service Act of 1940 and that the local board acted arbitrarily and capriciously in considering the matter of his classification (Pet. 9-11, 18-19).³ We submit, however, that the evidence offered by petitioner and rejected by the trial court was insufficient to raise any such issue.

In his Selective Service Questionnaire petitioner claimed both the complete exemption from service accorded by the Act to ministers of religion (Sec. 5 (d)) and the exemption from combatant service accorded to conscientious objectors (Sec. 5 (g)) (R. 56). In addition, in the special form for conscientious objectors which petitioner filed with the local board, he claimed the exemption from participation in any service under the direction of military authorities (Sec. 5 (g)) (R. 63). It was for the local board to determine these claims, subject to the right of administrative appeal afforded by

³ The question, in substance, is like that sought to be raised in *Bowles v. United States*, No. 589, this Term. In that case, however, Bowles claimed to be a conscientious objector and was ordered to report for induction for military service. In this case, petitioner was classified as a conscientious objector and was ordered to report for work of national importance. Thus the argument advanced by Bowles that erroneous classification should be allowed as a defense in a criminal prosecution because reporting for induction would violate conscientious scruples is inapplicable here.

the Act (Sec. 10) and the Selective Service Regulations (Sec. 627.2).

Insofar as petitioner's proffered evidence related solely to a contention that his classification was erroneous as lacking supporting evidence, that issue was, in any event, an issue of law which was not for the jury to decide. • See *Reconstruction Finance Corporation v. Bankers Trust Co.*, Nos. 387-388, decided February 8, 1943, this Term.

Petitioner's assertion of error, however, is also grounded upon his offer to prove that the *local board* arbitrarily denied him a hearing and refused to "listen to" affidavits from the Watchtower Bible and Tract Society and "from his work that he had done, as well as the scriptural authority from the Bible" (R. 33). But this offer was irrelevant. The record shows that the ultimate administrative decision in respect of petitioner's classification was made, not by the local board, but by the *board of appeal*. Upon petitioner's appeal from the local board's 1-A classification, the appeal board on January 24, 1942, classified him in Class 1-A, "subject to question of conscientious objection" (R. 58). In accordance with the special procedure upon appeal provided by Section 5 (g) of the Act and Regulation 627.25 for registrants who claim exemption as conscientious objectors, the appeal board on the same date referred petitioner's case to the Department of Justice for an advisory recommendation concerning the character and good

faith of his objections to participation in war (R. 58).⁴ It is evident from this action of the appeal board that it considered and rejected petitioner's claim to exemption as a minister (see Reg. 627.25 (a)).⁵ Several months later, on June 17, 1942, the appeal board classified petitioner in Class 4-E (R. 58).

As we pointed out in our brief in the *Bowles* case, pp. 20-21, the action of the appeal board in the Selective Service system is essentially a *de novo* classification. It must examine the appeal of a registrant upon the information contained in the registrant's file (Reg. 627.24 (b)), and if that information is not sufficient to enable the appeal board to determine the registrant's classification,

⁴ See pp. 36-38, 71-79 of Brief for the United States in *Bowles v. United States*, No. 589, decided May 3, 1943, rehearing denied, June 7, 1943, for a description of the procedure on appeal by persons asserting conscientious objections. Under this procedure the registrant is entitled to a hearing before a Hearing Officer of the Department of Justice and he may present any pertinent evidence.

⁵ All members of the Jehovah's Witness sect claim to be either full-time or part-time "ministers." The Watchtower Bible and Tract Society is at the head of the movement and it "ordains" these Witnesses by furnishing each * * * a certificate that he is a minister of the Gospel." See p. 4 of the dissenting opinion of Mr. Justice Jackson in *Douglas et al. v. City of Jeannette (Pa.) et al.*, decided May 3, 1943; see also *Rose v. United States*, 129 F. (2d) 204, 208-209 (C. C. A. 6); *Buttecali v. United States*, 130 F. (2d) 172, 174 (C. C. A. 5). In practice, Selective Service classifies as ministers only those Jehovah's Witnesses whose names appear on a list prepared for Selective Service by the Watchtower Bible and Tract Society.

the file is returned to the local board with proper instructions (Reg. 627.23). In transmitting the file to the appeal board the local board "should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision" (Reg. 627.13 (a)). The appeal board "shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant" (Reg. 627.26 (a), and see Reg. 623.21). In the case of a registrant claiming conscientious objections, the matter, as we have noted, is referred to the Department of Justice for hearing and recommendation. The classification of the appeal board is final, except where an appeal is taken to the President (Reg. 627.26 (b)). It is clear, therefore, that the classification of the appeal board supersedes the local board's classification. Accordingly, the decision of the local board and any irregularity on its part in deciding a registrant's classification is without significance when his case has been decided by the appeal board.

Petitioner did not at the trial attack the action of the appeal board, except insofar as he sought to show that he was a minister. His offer of proof was directed solely to the action of the local board in allegedly denying him a hearing and refusing to listen to documentary evidence concerning his

status with the Watchtower Bible and Tract Society. His offer did not specify the precise nature of this evidence and, contrary to the implication of his argument (Pet. 5), he did not offer to prove that the local board refused to receive it or, what is more important, that it was not before the appeal board. On the contrary, the evidence admitted and offered at the trial indicates that all pertinent evidence relating to petitioner's ministerial status was before both the local board and the appeal board. In his Selective Service Questionnaire and conscientious objector's form, petitioner gave the details of his standing with the Society and he attached to the form the Society's certificate that he was an "ordained minister of Jehovah God" (R. 67) and a lengthy statement of his own relating the creed of Jehovah's Witnesses and his position among them and with the Society (R. 69-70). In addition, in his reply of September 8, 1942, to the local board's notice to him of suspected delinquency in failing to present himself for work of national importance (R. 61), following his final classification by the appeal board in Class 4-E, petitioner requested the local board to reconsider his case "and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV-E" (R. 62).⁶

⁶ It should be noted that the affidavits of other persons which petitioner sought to introduce at the trial are dated

Furthermore, even if the local board did refuse to receive material evidence, its action would not have foreclosed petitioner from presenting such evidence to the appeal board, for Regulation 627.12 provides that on his appeal the registrant "may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and *may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.*" [Italics supplied.] Thus it will be seen that an administrative remedy is expressly provided to protect against occurrences such as petitioner alleges. Petitioner did not offer to prove that, assuming he was prevented from presenting evidence to the local board, he could not or did not take advantage of the remedy provided in Regulation 627.12. And, indeed, as we have noted, the record indicates that the material sought to be shown to the local board was considered by the appeal board.

In this state of the record, petitioner's offer of proof was inadequate to raise the question he seeks

in May 1942 (R. 73-76), at the time his case was before the Department of Justice (see R. 58). They are marked as exhibits by the Hearing Officer of the Department and apparently were obtained for his consideration.

to present for determination by this Court. Even assuming, *arguendo*, that the local board acted irregularly in classifying petitioner in Class 1-A, its determination was superseded by the final action of the board of appeal in classifying him in Class 4-E, and there was no offer of proof that the appeal board acted arbitrarily, or that in consequence of the local board's allegedly arbitrary action the appeal board did not have before it all pertinent evidence which petitioner had to offer. Cf. *Bowles v. United States*, No. 589, decided May 3, 1943, rehearing denied, June 7, 1943.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
Special Assistant to the Attorney General.

JUNE 1943.

INDEX

| | Page |
|--|------|
| Opinion below..... | 1 |
| Jurisdiction..... | 1 |
| Questions presented..... | 2 |
| Statute and regulations involved..... | 2 |
| Statement..... | 3 |
| Summary of argument..... | 16 |
| Argument..... | 20 |
| A. Neither the statute nor the Constitution gives petitioner a right to a de novo trial by either the jury or the judge of his classification under the act and regulations..... | 20 |
| Trial de novo before the jury..... | 21 |
| Trial de novo by the judge..... | 24 |
| B. Neither the statute nor due process requires that the judge determine whether the registrant's classification was based on evidence and a fair consideration as a condition precedent to the registrant's conviction for disobedience of the order to report..... | 27 |
| 1. The scheme of the statute and the effectuation of its great purposes, as well as practical considerations, require that the registrant report as ordered and then seek judicial review in habeas corpus..... | 30 |
| The Government's position..... | 30 |
| The statutory scheme..... | 34 |
| The importance of preserving the administrative process..... | 45 |
| The consequences of being wrong are more severe under petitioner's position than under that of the Government..... | 51 |
| 2. The order to report is an interlocutory step in the Selective Service procedure and therefore is not the appropriate point for an attack on the classification..... | 54 |
| C. Petitioner's offer of proof was insufficient to establish arbitrary or unfair action of the administrative boards..... | 57 |
| The attack on the fairness of the boards..... | 57 |
| The attack on the sufficiency of the evidence..... | 61 |
| D. Petitioner's charge that the Selective Service System has discriminated against Jehovah's Witnesses is unfounded..... | 64 |
| Conclusion..... | 78 |
| Appendix A..... | 79 |
| Appendix B..... | 84 |
| Appendix C..... | 118 |
| Appendix D..... | 126 |

II

CITATIONS

| Cases: | Page |
|--|--------------------|
| <i>Aderhold v. Soileau</i> , 67 F. (2d) 259..... | 49, 50 |
| <i>American Federation of Labor v. National Labor Relations Board</i> , 308 U. S. 401..... | 55 |
| <i>Angelus v. Sullivan</i> , 246 Fed. 54..... | 50 |
| <i>Arbitman v. Woodside</i> , 258 Fed. 441..... | 50 |
| <i>Bazley v. United States</i> , 134 F. (2d) 998..... | 33, 53 |
| <i>Benesch v. Underwood</i> , 132 F. (2d) 430..... | 50, 52 |
| <i>Bowles v. United States</i> , 319 U. S. 33..... | 28, 32, 58, 61, 62 |
| <i>Buttcali v. United States</i> , 130 F. (2d) 172..... | 33, 53 |
| <i>Chebinski v. United States</i> , 129 F. (2d) 461..... | 33, 54 |
| <i>Crane v. State</i> , 5 Okla. Cr. 560..... | 23 |
| <i>Crowell v. Benson</i> , 285 U. S. 22..... | 16, 23, 26 |
| <i>Davis v. Department of Labor and Industries</i> , 317 U. S. 249..... | 27 |
| <i>Drumheller v. Berks County Local Board No. 1</i> , 130 F. (2d) 610..... | 56 |
| <i>Endicott Johnson Corp. v. Perkins</i> , 317 U. S. 501..... | 49, 55 |
| <i>Ex parte Beales</i> , 252 Fed. 177..... | 50 |
| <i>Ex parte Green</i> , 123 F. (2d) 862, certiorari denied, 316 U. S. 668..... | 51, 52 |
| <i>Ex parte Hutfis</i> , 245 Fed. 798..... | 50 |
| <i>Ex parte Kerekes</i> , 274 Fed. 870..... | 50 |
| <i>Ex parte Platt</i> , 253 Fed. 413..... | 51 |
| <i>Ex parte Robert</i> , 49 F. Supp. 131..... | 53 |
| <i>Ex parte Romano</i> , 251 Fed. 762..... | 49 |
| <i>Ex parte Stanziale</i> , 49 F. Supp. 961, reversed, October 6, 1943..... | 52 |
| <i>Ex parte Tinkoff</i> , 234 Fed. 912..... | 49 |
| <i>Fire Department v. Gilmour</i> , 149 N. Y. 453..... | 31 |
| <i>Fletcher v. United States</i> , 129 F. (2d) 262..... | 32, 55 |
| <i>Franko v. Murray</i> , 248 Fed. 865..... | 28, 50 |
| <i>Geglow v. UH</i> , 239 U. S. 3..... | 31, 34 |
| <i>Goff v. United States</i> , 135 F. (2d) 610..... | 33, 53 |
| <i>Greenberg, Application of</i> , 39 F. Supp. 13..... | 50, 52 |
| <i>Hamilton v. Regents</i> , 293 U. S. 245..... | 25 |
| <i>Hannibal Bridge Co. v. United States</i> , 221 U. S. 194..... | 23 |
| <i>Hirabayashi v. United States</i> , No. 870, October Term, 1942..... | 33, 34 |
| <i>Honaker v. United States</i> , 135 F. (2d) 613..... | 33, 53 |
| <i>Houston v. Moore</i> , 5 Wheat. 1..... | 47 |
| <i>Howat v. Kansas</i> , 258 U. S. 131..... | 49 |
| <i>Inghram v. Union Stockyards Co.</i> , 64 F. (2d) 390..... | 49 |
| <i>Jacobson v. Massachusetts</i> , 197 U. S. 11..... | 25 |
| <i>Johnson v. United States</i> , 126 F. (2d) 242..... | 33 |
| <i>Lehigh Valley R. Co. v. United States</i> , 188 Fed. 879..... | 49 |
| <i>Locke v. United States</i> , 75 F. (2d) 157..... | 49 |
| <i>Louisiana & P. B. Ry. Co. v. United States</i> , 257 U. S. 114..... | 62 |
| <i>Martin v. Mott</i> , 12 Wheat. 19..... | 47 |
| <i>McCall's Case</i> , 5 Phila. (Pa.) 259..... | 48 |

III

Cases—Continued.

| | Page |
|--|--------------------|
| <i>McCann v. New York Stock Exchange</i> , 80 F. (2d) 211, certiorari denied, 299 U. S. 603..... | 49 |
| <i>McLean v. Jephson</i> , 123 N. Y. 142..... | 26 |
| <i>McLeod v. Majors</i> , 102 F. (2d) 128..... | 49 |
| <i>Micheli v. Paullin</i> , 45 F. Supp. 687..... | 50, 52 |
| <i>Mississippi Power & Light Co. v. Federal Power Commission</i> , 131 F. (2d) 148..... | 55 |
| <i>Miss. Valley Barge Co. v. United States</i> , 292 U. S. 282..... | 62 |
| <i>Monongahela Bridge v. United States</i> , 216 U. S. 177..... | 16, 23 |
| <i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41..... | 27, 48, 55, 63 |
| <i>Ng Fung Ho v. White</i> , 259 U. S. 276..... | 31 |
| <i>People v. McCoy</i> , 125 Ill. 289..... | 26, 31 |
| <i>Piuma v. United States</i> , 126 F. (2d) 601, certiorari denied, 317 U. S. 637..... | 49 |
| <i>Rase v. United States</i> , 129 F. (2d) 204..... | 11, 25, 33, 50, 53 |
| <i>R. F. C. v. Bankers Trust Co.</i> , 318 U. S. 163..... | 24, 31 |
| <i>Richter v. State</i> , 16 Wyo. 437..... | 23 |
| <i>Rogers, In re</i> , 47 F. Supp. 265..... | 50, 52 |
| <i>School of Magnetic Healing v. McAnnulty</i> , 187 U. S. 94..... | 31 |
| <i>Seele v. United States</i> , 133 F. (2d) 1015..... | 33, 54 |
| <i>Shields v. Utah Idaho R. Co.</i> , 305 U. S. 177..... | 23, 26, 27 |
| <i>Silberschein v. United States</i> , 266 U. S. 221..... | 34 |
| <i>Spencer & Garder v. People</i> , 68 Ill. 510..... | 26 |
| <i>State v. Kirby</i> , 120 Iowa 26..... | 26 |
| <i>State v. Lamos</i> , 26 Maine 258..... | 26 |
| <i>State v. Raczkowski</i> , 86 Conn. 677..... | 23 |
| <i>State v. Weimer</i> , 64 Iowa 243..... | 26 |
| <i>Stevens, Landowner</i> , 228 Mass. 368..... | 26 |
| <i>Stirge's Case</i> , Fed. Cas. No. 13458..... | 51 |
| <i>Tagg Bros. v. United States</i> , 280 U. S. 420..... | 22, 62 |
| <i>Texas and Pacific Ry. v. Abilene Cotton Oil Co.</i> , 204 U. S. 426..... | 48 |
| <i>Union Bridge Co. v. United States</i> , 204 U. S. 364..... | 23 |
| <i>United States v. Bullard</i> , 290 Fed. 704, certiorari denied, 262 U. S. 760..... | 28, 49 |
| <i>United States v. Commanding Officer</i> , 252 Fed. 314..... | 51 |
| <i>United States v. Grieme</i> , 128 F. (2d) 811..... | 15, 32, 50 |
| <i>United States v. Heyburn</i> , 245 Fed. 360..... | 50 |
| <i>United States v. Kauten</i> , 133 F. (2d) 703..... | 33, 50, 53, 54, 56 |
| <i>United States v. Kinkead</i> , 248 Fed. 141, affirmed, 250 Fed. 692..... | 51 |
| <i>United States v. Kowal</i> , 45 F. Supp. 301..... | 54 |
| <i>United States v. Los Angeles & Salt Lake R. R.</i> , 273 U. S. 299..... | 55 |
| <i>United States v. Macintosh</i> , 283 U. S. 605..... | 25 |
| <i>United States v. Mroz</i> , 136 F. (2d) 221..... | 33, 54 |
| <i>United States v. Newman</i> , 44 F. Supp. 817..... | 54 |
| <i>United States v. Pace</i> , 46 F. Supp. 316..... | 54 |
| <i>United States v. Rauch</i> , 253 Fed. 814..... | 50, 56 |

IV

Cases—Continued.

| | Page |
|--|------------|
| <i>United States ex rel. Bayly v. Reckford</i> , decided August 16, 1943..... | 32 |
| <i>United States ex rel. Bevans v. Reckford</i> , decided August 16, 1943..... | 52 |
| <i>United States ex rel. Broker v. Baird</i> , 39 F. Supp. 392..... | 52 |
| <i>United States ex rel. Cameron v. Embrey</i> , 46 F. Supp. 916..... | 50, 53 |
| <i>United States ex rel. Cascone v. Smith</i> , 48 F. Supp. 842..... | 51, 53 |
| <i>United States ex rel. Errichetti v. Baird</i> , 39 F. Supp. 388..... | 50, 53 |
| <i>United States ex rel. Filomio v. Powell</i> , 38 F. Supp. 183..... | 50, 53 |
| <i>United States ex rel. Pasciuto v. Baird</i> , 39 F. Supp. 411..... | 53 |
| <i>United States ex rel. Phillips v. Downer</i> , 135 F. (2d) 521..... | 50, 51, 52 |
| <i>United States ex rel. Ursitti v. Baird</i> , 39 F. Supp. 872..... | 53 |
| <i>Wise v. Withers</i> , 3 Cranch 330..... | 31 |

Statutes:

| | |
|---|------------------------|
| Act of April 22, 1898, 30 Stat. 361, 10 U. S. C. 1..... | 32 |
| Act of December 20, 1941, 55 Stat. 844..... | 35 |
| Act of November 13, 1942, 56 Stat. 1018..... | 35 |
| Articles of War, Sec. 2a, 41 Stat. 787, 10 U. S. C. 1473..... | 28 |
| Selective Training and Service Act of 1940, 54 Stat. 885, (50 U. S. C. Appendix 301-318): | |
| Section 2..... | 30, 35 |
| Section 3..... | 35, 42 |
| Section 4..... | 35 |
| Section 5 (d)..... | 11, 68 |
| Section 5 (e)..... | 35 |
| Section 5 (g)..... | 12, 36, 40, 41, 58 |
| Section 5 (h)..... | 37 |
| Section 10..... | 33, 36 |
| Section 10 (a)..... | 21 |
| Section 11..... | 21, 28, 30, 34, 35, 36 |

| | |
|---|----|
| British National Service (Armed Forces) Act, 1939, 2 and 3 Geo. VI, Ch. 81, Sections 5 (12), 6 (9), 10 (2), 11..... | 29 |
|---|----|

Regulations:

| | |
|---|-------|
| Army Regulations 615-360 (Par. 51)..... | 44 |
| Selective Service Regulations (1917), Secs. 133, 140..... | 28 |
| Selective Service Regulations: | |
| 601.5..... | 4 |
| 603.21..... | 37 |
| 603.51..... | 37 |
| 603.71..... | 37 |
| 621.1 (a)..... | 84 |
| 621.3..... | 8, 38 |
| 621.4..... | 38 |
| 622.11..... | 85 |
| 622.12..... | 31 |
| 622.44 (a)..... | 6, 85 |
| 622.44 (b)..... | 85 |
| 622.44 (c)..... | 86 |

Regulations—Continued.

| | Page |
|------------|--------|
| 622.51 | 39, 86 |
| 622.51 (a) | 86 |
| 622.51 (b) | 86 |
| 622.61 | 6 |
| 622.62 | 6 |
| 623.1 (a) | 38, 86 |
| 623.1 (b) | 87 |
| 623.1 (c) | 4, 87 |
| 623.2 | 38, 87 |
| 623.21 (a) | 39, 87 |
| 623.21 (b) | 87 |
| 623.21 (c) | 88 |
| 623.21 (d) | 88 |
| 623.21 (e) | 88 |
| 623.31 (a) | 39, 89 |
| 623.31 (b) | 89 |
| 623.33 (a) | 38, 89 |
| 623.33 (b) | 89 |
| 623.33 (c) | 90 |
| 623.33 (g) | 91 |
| 623.33 (h) | 91 |
| 623.33 (j) | 91 |
| 623.51 (a) | 91 |
| 623.51 (b) | 92 |
| 623.51 (c) | 39, 92 |
| 623.51 (d) | 92 |
| 623.51 (e) | 92 |
| 623.61 | 39 |
| 625.1 | 39, 92 |
| 625.1 (a) | 92 |
| 625.1 (b) | 93 |
| 625.2 | 39, 93 |
| 625.2 (a) | 93 |
| 625.2 (b) | 93 |
| 625.2 (c) | 94 |
| 625.2 (d) | 94 |
| 625.2 (e) | 39, 94 |
| 626.1 | 37, 95 |
| 626.1 (a) | 95 |
| 626.1 (b) | 95 |
| 626.1 (c) | 95 |
| 626.2 (a) | 95 |
| 626.2 (b) | 96 |
| 627.1 (a) | 39, 96 |
| 627.1 (b) | 96 |
| 627.2 (a) | 39, 96 |
| 627.2 (b) | 96 |
| 627.2 (c) | 97 |

VI

Regulations—Continued.

| | Page |
|--------------|----------------|
| 627.11 | 40, 97 |
| 627.11 (a) | 97 |
| 627.12 | 40, 60, 61, 98 |
| 627.13 (a) | 40, 98 |
| 627.13 (b) | 98 |
| 627.23 | 40, 99 |
| 627.24 (a) | 99 |
| 627.24 (b) | 99 |
| 627.25 | 40, 58, 99 |
| 627.25 (a) | 58, 99 |
| 627.25 (b) | 100 |
| 627.25 (c) | 41, 101 |
| 627.26 | 41, 101 |
| 627.26 (a) | 101 |
| 627.26 (b) | 58, 101 |
| 627.27 | 41, 101 |
| 627.31 | 41 |
| 627.41 | 40, 102 |
| 627.61 (a) | 102 |
| 627.61 (b) | 102 |
| 628 | 41, 103 |
| 628.1 | 42, 103 |
| 628.1 (a) | 103 |
| 628.1 (b) | 103 |
| 628.1 (c) | 104 |
| 628.2 | 42 |
| 628.4 (a) | 42 |
| 628.6 | 42, 104 |
| 628.7 | 104 |
| 628.7 (a) | 105 |
| 628.7 (b) | 42, 105 |
| 633.1 | 105 |
| 633.1 (a) | 43, 105 |
| 633.9 | 43 |
| 633.10 (c) | 43, 105 |
| 633.13 | 105 |
| 633.13-2 (a) | 39, 44, 105 |
| 651.1 | 106 |
| 651.2 (a) | 106 |
| 651.3 (a) | 107 |
| 651.7 (a) | 107 |
| 651.7 (b) | 44, 107 |
| 651.8 | 108 |
| 651.9 | 44, 108 |
| 651.10 (a) | 108 |
| 651.10 (b) | 44, 109 |
| 652.1 | 44, 109 |
| 652.2 | |

VII

Regulations—Continued.

| | Page |
|---|----------------|
| 652.2 (a)..... | 109 |
| 652.11..... | 44, 110 |
| 652.11 (a)..... | 110 |
| 652.12 (a)..... | 111 |
| 653.1 (a)..... | 111 |
| 653.1 (b)..... | 112 |
| 653.1 (c)..... | 112 |
| 653.2 (a)..... | 112 |
| 653.2 (b)..... | 112 |
| 653.2 (c)..... | 112 |
| 653.11..... | 56, 113 |
| 653.11 (a)..... | 113 |
| 653.11 (b)..... | 113 |
| 653.11 (c)..... | 113 |
| 653.11 (d)..... | 114 |
| 653.11 (e)..... | 114 |
| 653.11 (f)..... | 114 |
| 653.12..... | 114 |
| 653.13 (a)..... | 115 |
| 653.13 (b)..... | 115 |
| 653.15 (a)..... | 115 |
| 653.15 (b)..... | 115 |
| 653.15 (c)..... | 115 |
| 653.15 (d)..... | 116 |
| 653.15 (e)..... | 116 |
| 653.15 (f)..... | 116 |
| 653.16..... | 44, 117 |
| War Department Mobilization Regulations 1-7, Par. 13e..... | 55 |
| Miscellaneous: | |
| Bullock, <i>Judicial Review of Selective Service Board Classifications by Habeas Corpus</i> (1942), 10 Geo. Wash. L. Rev. 827, 829..... | 50 |
| 86 Cong. Rec. 10895, 11710, 12039, 12084..... | 29 |
| C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912-1930)..... | 29 |
| First Report of Director of Selective Service, 1940-41 <i>Selective Service in Peacetime</i> (1942)..... | 37, 38, 43, 54 |
| Hearings before House Committee on Military Affairs on the Selective Service Act of 1917, 65th Cong., 1st sess., p. 81..... | 46 |
| JAG 327.3..... | 29 |
| JAG 334.4..... | 29 |
| Letter from Hayden C. Covington..... | 122 |
| Letter from G. Myrddin-Evans, dated August 22, 1942..... | 77, 118 |
| Lewis, <i>Appeal Procedure under the Selective Service Law</i> (1942)..... | 37 |
| Military Service Act, 5 and 6 Geo. V, ch. 104..... | 30 |
| National Registration Act, 5 and 6 Geo. V, ch. 60..... | 30 |
| Note, <i>Classification—Physical Deferrals</i> (1942), 17 Ind. L. J. 308, 312..... | 54 |

VIII

Miscellaneous—Continued.

| | Page |
|---|----------------|
| Note (1942), 91 U. of Pa. L. Rev. 366..... | 55 |
| Second Report of Director of Selective Service, 1941-42, <i>Selective Service in Wartime</i> (1943)..... | 37, 78 |
| Yearbooks of Jehovah's Witnesses: | |
| 1931..... | 73- |
| 1932..... | 73, 74 |
| 1933..... | 74 |
| 1934..... | 75 |
| 1935..... | 75 |
| 1936..... | 75 |
| 1937..... | 75 |
| 1938..... | 75, 76 |
| 1939..... | 75, 76 |
| 1940..... | 73, 75 |
| 1941..... | 75 |
| 1942..... | 75 |
| 1943..... | 72, 75, 76, 77 |

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 73

NICK FALBO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals is reported at 135 F. (2d) 464.

JURISDICTION

The judgment of the circuit court of appeals was entered May 6, 1943 (R. 100-101). The petition for a writ of certiorari was filed May 28, 1943, and was granted June 21, 1943 (R. 103). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. In a prosecution for disobedience of an order to report for work of national importance under civilian direction, is a registrant under the Selective Training and Service Act of 1940 entitled to have either the jury or the trial judge try *de novo* the merits of his classification under the Act?

2. In a prosecution for disobedience of an order to report for work of national importance under civilian direction, is a registrant entitled to have the trial judge review his classification to determine if the Selective Service agencies acted fairly and upon evidence?

3. If Question 2 is answered in the affirmative, did petitioner sufficiently raise the question in the trial court when he claimed prejudice on the part of the local board only, whereas the effective classification was made by the board of appeal after a *de novo* consideration, and when he did not offer in evidence the file on which the administrative determination was based, though the entire file was made available to him?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, and of the Selective Service Regulations, are set forth in Appendix A and Appendix B, respectively, *infra*, pp. 79-117.

STATEMENT

Petitioner was indicted on November 12, 1942, in the United States District Court for the Western District of Pennsylvania in one count charging that, having been classified as a conscientious objector and accordingly having been placed in Class IV-E* by the local board with which he was registered, he wilfully failed and neglected to perform duties required of him under the Selective Training and Service Act of 1940 and regulations promulgated thereunder, pursuant to his assignment as a conscientious objector to work of national importance under civilian direction (R. 82-83).

Petitioner interposed a plea in abatement to the indictment, alleging that he had been a "regular minister of religion" since 1931 and a "duly ordained minister" since September 1, 1940, and that these facts were made known to the local board at the time he filed his questionnaire and special form for conscientious objectors. He contended in his plea (1) that the local board was without authority to order him to report for work of national importance because the Act exempts regular and duly ordained ministers of religion from training and service, although not from registration, and (2) that the court was without jurisdiction because he had valid reasons for having failed to perform the duty required of him, namely, that the local board had acted

* The meaning of this and other classification symbols is explained in Appendix D, *infra*, p. 126.

unfairly, arbitrarily, and capriciously and in violation of the Selective Service Regulations, in consequence whereof he was wrongly classified and ordered to report.¹ (R. 3-4, 8.) The Government, although not admitting the facts alleged in the plea, asked that it be denied on the ground that it sought to raise an issue which had already been determined by the proper tribunal and was not for the court to determine (R. 8-9). The plea was denied on that ground, the district court stating that "the Board has the decision of whether or not this man is to be listed as he claims he should be" (R. 9).

The evidence introduced by the Government in the trial before a jury (R. 8) showed as follows:

¹ Petitioner cited in this connection (R. 3, 4) Section 623.1 (c) of the Selective Service Regulations, which provides: "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice."

Section 601.5, which petitioner also cited in his plea (R. 4), defines a "delinquent" as, *inter alia*, any registrant who, prior to induction, fails to perform any duty imposed upon him by the Act and directions given pursuant thereto and has no valid reason for having failed to perform the duty. Although petitioner cited this section in connection with his allegation that the local board "violated and omitted material steps prior to the order to report and contrary to the rules and regulations of the Selective Service System" (R. 4), the import of the allegation presumably was that he should not be considered a delinquent because he had a valid reason for failing to report as ordered in that the local board had acted arbitrarily, and that for this reason the court was without jurisdiction.

Petitioner registered with Local Board No. 11 of West Newton, Westmoreland County, Pennsylvania, on October 16, 1940 (R. 10-11, 50).² His Selective Service Questionnaire was filed with the board on August 23, 1941 (R. 51). Petitioner was then 26 years of age (R. 52), single, and had no dependents (R. 54-55). In his questionnaire, he stated his occupation to be "'Pioneer' for Watchtower Bible and Tract Society," that he worked as a "'Minister' Preaching the Gospel of God's Kingdom," that he had had 11 years' experience in this work, and that he received no earnings from it (R. 52). He also stated that he had worked as a clerk selling clothing from 1937 to 1939, but that his usual occupation and the one for which he was best fitted was that of "Minister" (R. 54). In the section of the questionnaire provided for ministers and students preparing for the ministry, he claimed that he had been a minister of religion of the Watchtower Bible and Tract Society since July 1, 1930, that he was formally ordained by the Society on that date, and that he customarily served as a minister (R. 56). In addition, he stated that by reason of religious training and belief he was conscientiously opposed to participation in war in any form and he therefore claimed exemption from combatant training and service (R. 56). Finally, he stated that in his opinion his classification should be

² Neither side sought to introduce petitioner's entire Selective Service file; each introduced portions of it.

IV-D, as a minister (see Reg. 622.44 (a)) (R. 57).

The clerk of the local board testified that petitioner was classified in "Tentative 1" by the local board on August 25, 1941 (R. 11); that he appealed this classification on January 26, 1942, and was classified I-A by the board of appeal (R. 11-12); that he "again submitted evidence" to the board of appeal and asked that his file be returned to that board; and that on June 17, 1942, the board of appeal classified him IV-E, as a conscientious objector, by a vote of four to nothing (R. 12).³ In accordance with the directions

³ The testimony of the clerk does not conform in all respects with the notations appearing on page 8 of petitioner's Selective Service Questionnaire. According to these notations petitioner was classified in Class I by the local board on August 25, 1941, and in Class I-A "as per Form 200" on January 19, 1942. (Form 200 is the Report of Physical Examination by the examining physician of the local board.) His notation of appeal is dated January 26, 1942, and the action of the board of appeal in classifying him I-A is dated January 24, 1942. The minute of this action by the board of appeal states, however, that it was "subject to question of conscientious objection" and that the case was referred to the Department of Justice on that date. Petitioner was classified in Class IV-E by the board of appeal on June 17, 1942, and on July 15, 1942, the local board reclassified him in that class "as per classification recommendation of the Appeal Board" (R. 58). The notation of reclassification in Class IV-F appearing at the bottom of page 8 (R. 58) is dated January 5, 1943, which was subsequent to the trial and judgment of conviction (R. 8, 80-81). Petitioner was apparently reclassified IV-F because of his conviction. See Reg. 622.61, 622.62.

of the State Director of Selective Service, the local board notified petitioner on August 21, 1942, that he had been assigned to work of national importance under civilian direction at Civilian Public Service Camp No. 46 at Big Flats, New York, and ordered him to report to the local board on September 2, 1942, for instructions and papers (R. 13-14, 59). Petitioner failed to report as ordered (R. 15).

At the close of the Government's case petitioner moved to dismiss the action on substantially the same grounds as those alleged in his plea in abatement (*supra*, pp. 3-4), and on the further ground that the Government's evidence showed that at all times since his registration he had been a regular and duly ordained minister (R. 6-7, 22). The motion was denied (R. 23).

In defense to the charge of the indictment, petitioner sought to prove that he was in fact a minister of religion and that the local board denied him a hearing. Some evidence concerning his status with the Watchtower Bible and Tract Society was admitted without objection: petitioner testified that he was a "special representative known as a special pioneer for the Watch Tower Bible and Tract Society" and "a regular and duly ordained minister of the" Society (R. 23); that he had been engaged "as one of Jehovah's witnesses, as a regular minister of religion" from 1930 until September 1, 1940, when he was appointed a "pioneer minister"; that he became a "special pioneer" on

April 16, 1942; and that since 1930 he had customarily preached and taught the principles of the Society as a minister of the group or class of people known as Jehovah's Witnesses (R. 23-24, 36, 37). Petitioner was permitted to introduce in evidence, limited to the purpose of showing that he was a conscientious objector as determined by the board of appeal (R. 26-28), the special form for conscientious objectors which he had filled out and filed with the local board on or about August 30, 1941 (R. 63-66).^{*} In the form, petitioner claimed exemption from participation in war in any form and from participation in any service which is under the direction of military authorities (R. 63). He stated that he received his religious training and acquired his belief, which were the bases of his conscientious objections, by studying the Bible and publications of the Watchtower Bible and Tract Society and by attending Bible studies, and that he acquired his belief on July 1, 1930, "through" the Society (R. 63); that he became a member of Jehovah's Witnesses on that date "by consecration, and by reading the Watchtower Publications"; and that the church, congregation, or meeting which he customarily attended was "Kingdom Hall," Monessen, Pennsylvania, of which one Angelo Galuppo was the pastor or leader (R. 65). Galuppo was identified in the form as a "Company-Servant," and petitioner

^{*} This form, when filed, becomes a part of the registrant's questionnaire (Reg. 621.3; see also R. 63).

referred to him and one Earl V. Singer, a "Zone Servant," as persons who could supply information as to the sincerity of petitioner's professed convictions against participation in war (R. 66). Attached to the form (R. 26) was an undated certificate issued by the Watchtower Bible and Tract Society stating that petitioner was an "ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and is therefore one of Jehovah's witnesses; that he is sent forth by this Society, which is created and organized and chartered by law to preach the gospel of God's kingdom, and that Jehovah's witnesses are commanded to obey God by preaching the gospel"; and that "Jehovah's witnesses preach the gospel and worship Almighty God by calling upon the people at their homes and exhibiting to them the message of said gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them" (R. 67). In a document entitled "My Statement," which he also attached to his conscientious objector's form (R. 26), petitioner stated that he had been one of Jehovah's Witnesses for 11 years and had "actively engaged in preaching the Gospel of God's Kingdom from house to house and from city to city"; that he was "recognized by the Watchtower Bible and Tract Society as a full time publisher known as a 'Pioneer'"; that his name had not

appeared on the "list of full time publishers" published in "Consolation #569,"^s which he had filed with his questionnaire, because he had had his "name temporarily removed because of sickness but it has been re-entered since, and I have resumed in the Pioneer service"; that his "purpose and commission is to give testimony before the people of the world that Jehovah is the Almighty God and that His purpose is to set up in full operation 'The Theocracy,' " which is "the government of Jehovah God by and under the immediate direction of Christ Jesus the King"; that as a "witness transmitting the message of Almighty

^s The reference was to the July 9, 1941, issue of "Consolation," a biweekly magazine published by the Watchtower Bible and Tract Society. This issue contained a reprint of Opinion No. 14 of the Deputy Director of Selective Service, dated June 12, 1941 (see Appendix to Petitioner's Brief, pp. 36-39), concerning the ministerial status of Jehovah's Witnesses, together with lists of Jehovah's Witnesses known as members of the Bethel family and pioneers who, in the opinion of the Deputy Director, might be classified as ministers within the meaning of the Act. Concerning pioneers, Opinion No. 14 stated that "The members of Jehovah's Witnesses who devote their time to the work of teaching the tenets of their religion and in the converting of others to their belief, and who enjoy the esteem of other Jehovah's Witnesses, and are each individually recorded as 'pioneers' by the Watchtower Bible and Tract Society, Inc., at its executive offices in Brooklyn, New York, are in a position where they may be recognized as having a standing, in relationship to the organization and to the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers in other religions, and such persons who spend all or a substantial part of their time in the work of Jehovah's Witnesses, as set forth above, come within the purview of Section

God" and a sincere person "devoted to Jehovah * * * in a covenant to do His will and * * * accepted by Him," he was ordained by God as a minister; that as a Jehovah's Witness "wholly devoted to Almighty God, and to His Kingdom under Christ Jesus," he could not "take sides in a war between nations, both of which are against God and His Kingdom"; and that it was "the will of Almighty God Jehovah, and of his King Christ Jesus," that he should "not engage in war between the nations of the earth" and that he was "forbidden to so engage therein." Petitioner concluded his statement with a request "for classification (4-D) for complete exemption." (R. 69-70.)

5 (d) of the Selective Training and Service Act of 1940 and may be classified in Class IV-D, provided that the names of such persons appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System." The list of pioneers and members of the Bethel family referred to in Opinion No. 14 was prepared by the Watchtower Bible and Tract Society at the request of National Headquarters of the Selective Service System (see *Rose v. United States*, 129 F. (2d) 204, 208 (C. C. A. 6)). Petitioner's name did not appear on the list of pioneers furnished by the Society pursuant to this request (see R. 69). Petitioner's Selective Service file shows that an application by the Society to National Headquarters to have petitioner's name added to the certified official list of pioneers and members of the Bethel family was denied in May 1942 and that this information was communicated to the local board by the acting State Director of Selective Service under date of May 18, 1942, while petitioner's appeal was pending before the board of appeal (see n. 3, p. 6, *supra*).

The court excluded as having no bearing on the issues in the case (R. 29) another certificate issued by the Watchtower Bible and Tract Society on October 7, 1941, stating that petitioner had been associated with the Society since 1931; that he had been appointed in 1941 as a "direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory"; that his entire time was "devoted to missionary work" and that he had "declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God"; and that he had "the Scriptural ordination to preach 'this Gospel of the Kingdom'" and was, "therefore, declared by this Society a duly ordained minister of the Gospel" (R. 71).⁶

Petitioner sought to show through the testimony of the witness Galuppo, who was described

⁶ The court also excluded (R. 29-30) a letter from the Society, dated May 21, 1942, addressed to M. W. Acheson, the hearing officer of the Department of Justice who heard petitioner's claim for exemption as a conscientious objector (see Sec. 5 (g) of the Act, Appendix, *infra*, pp. 79-81), concerning petitioner's standing with the Society. This letter stated that petitioner became a "full-time pioneer and direct representative in carrying on the work of preaching the gospel on September 1, 1940," that his name was removed from the full-time list on January 29, 1941, after he had written the Society that his health prevented him from serving full time, that he was reinstated to the full-time list upon his own application on August 16, 1941, and that he was "promoted to special publisher pioneer" on April 16, 1942 (R. 77).

as "the managing agent of the Watchtower Bible and Tract Society in the Monessen district" (R. 35), that he was reputed to be "an ordained minister of religion" and was engaged in no other occupation; that he was a "special pioneer" appointed by the Society and was required to devote 175 hours per month "in this capacity"; that he regularly conducted Bible study classes and engaged in house to house work "in the proclamation of the knowledge of the Bible"; and that at all times since his registration under the Act he "spent his entire time in the ministerial work" (R. 34-35). Petitioner also attempted to prove by his own testimony that a pioneer is required by the Society to "put in at least 150 hours per month in preaching the Gospel"; that a pioneer occupies a privileged status, "under which the individual who puts in this number of hours is granted compensation by means of reduced costs of literature that is distributed among the people, so that he might defray his expenses" (R. 36-37); and that prior to September 1, 1940, when he was appointed a pioneer, he "spent not less than thirty hours per month in ministerial work" (R. 39). In addition, petitioner offered to prove that when he went before the local board for a hearing, one of the board members told him, "I do not have any damned use for Jehovah's Witnesses," and that petitioner "attempted to produce evidence by affidavits from the Watch Tower Bible and Tract Society and from his work that he

had done, as well as the scriptural authority from the Bible," but was told that the board had "no time to listen to this" (R. 33).⁷

Objections by the Government to the proffered evidence described in the preceding paragraph were sustained by the trial judge, principally on the ground that such evidence related to petitioner's classification and the court had no authority to disturb the determination of the Selective Service boards in classifying petitioner as a conscientious objector (R. 33, 35-36, 37, 38, 39).⁸

⁷ The offer of proof went to the conduct of the local board only. No evidence was offered tending to show prejudice or a refusal to receive evidence on the part of the appeal board. See *infra*, pp. 57-61.

⁸ The court also excluded the following documents which petitioner offered: a statement signed by petitioner outlining his standing with the Watchtower Bible and Tract Society and requesting reclassification as a minister (R. 30, 72) (this statement bears no date and is addressed "To whom it may concern"; it is marked as an exhibit in the hearing before Mr. Acheson and apparently was submitted to him (R. 72)); petitioner's letter to the local board dated September 8, 1942, in response to the Board's notice to him of suspected delinquency (R. 31, 61), in which petitioner requested the board "to reconsider my case and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV-E" (R. 30-31, 62); a statement concerning his work, dated September 9, 1942, which petitioner gave to an agent of the Federal Bureau of Investigation (R. 31-32, 78-79); and three affidavits of other persons, dated in May 1942, stating that petitioner was a "Pioneer" for the Society (R. 30, 73, 74-75, 76). Apart from the question of their relevance to the issues, the *ex parte* statements and affidavits were objected to and rejected as self-serving declarations and as not being the best evidence of the matters contained therein. (See R. 30, 32.)

Similarly, in his charge to the jury, the judge instructed, *inter alia*, that petitioner's classification in Class IV-E as a conscientious objector was binding upon the court and jury, and that if petitioner had any legal objection to his classification he could have had it judicially determined by reporting to the local board and then applying for a writ of habeas corpus (R. 41). Petitioner's exceptions to the charge (R. 42) were overruled, as were his requested instructions that the jury should acquit if they found that the "Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing" (R. 42), or if the jury found that petitioner was "a regular and or duly ordained minister of religion, and that the Local Board and Board of Appeals had knowledge of this from the evidence presented" (R. 42-43).

Petitioner was convicted (R. 43, 80) and was sentenced to imprisonment for five years (R. 48, 80-81). On appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed *per curiam* (R. 100-101) on the authority of the earlier decision of that court in *United States v. Grieme*, 128 F. (2d) 811. In that case the court held that "The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary or capricious manner are not defenses to a prose-

cution under the Act for a failure to comply with the board's order" (p. 815).

SUMMARY OF ARGUMENT

A. Petitioner is not entitled to a trial *de novo* before either the jury or the judge concerning the merits of his draft classification. It is well settled that the courts will not review *de novo* an administrative determination unless Congress has placed on them the obligation to do so. Here Congress has not done so. On the contrary, it has made the administrative determination final. The presumption of innocence in criminal cases, of course, does not affect this rule; there is no presumption that the order to report is invalid but only that petitioner did not knowingly disobey it. That the jury may not ordinarily question such an administrative decision has been clear since *Monongahela Bridge v. United States*, 216 U. S. 177, and the reasons for the rule are the stronger where, as here, the order is made in the exercise of the war power to summon the manpower of the nation to its defense. And petitioner's argument in reliance on *Crowell v. Benson*, 285 U. S. 22, that the judge must determine his status *de novo* because the board had no jurisdiction to order him to report if he was in fact a minister, is without merit because *first*, ministers are not constitutionally exempt from the Selective Service Act, and he makes no claim to the contrary; and *second*, Congress, in bestowing an ex-

emption on ministers, has placed in the Selective Service System the power and duty to decide the claim of exemption, as well as claims to deferred status.

B. Petitioner was not entitled to have the trial judge determine whether the Selective Service boards denied him a fair hearing or acted without evidence, nor to have the judge, if he thought petitioner's classification was arbitrary, declare that petitioner was entitled to disobey the order to report. Considerations of due process are fully satisfied by the careful administrative safeguards together with the right after induction to raise these questions by habeas corpus. The Constitution does not demand that the registrant be also entitled to flout with impunity the order to report. In time of national peril an army must be raised and supporting activities performed. One called who refuses to respond or who goes to jail contributes nothing to the services which are the reason for the call. Anything which encourages a registrant either to stand uncompliant or to challenge his classification from a position from which he goes to jail instead of to the army if his classification is upheld, is contrary to the purpose of the Selective Service Act and does not serve the need of the nation. The fairness of permitting this attack to be made as defense in a criminal proceeding is also illusory, because the Selective Service classification has been upheld in

all but two instances out of some 105 in which alleged arbitrariness of the classification was considered in habeas corpus proceedings. It is less stringent to induct the unsuccessful attacker than to punish him. Induction is not a penalty, or a sentence, but the fulfillment of an obligation applicable to all, equally, within the ambit of the call.

No analogy is perfect, but in the most nearly analogous instances administrative or judicial orders have been held to impose a duty of obedience subject to no exceptions, even though erroneous and possibly subject to being set aside by appropriate procedure.

The order to report should be obeyed also because it is but an interlocutory step in the process of induction into the armed forces or civilian service camps. After reporting the selectee may be rejected, as a substantial percentage are, for physical or other unfitness. Thus until the final step is taken any irregularity in the selectee's classification has not operated to his injury and he should be required to withhold his attack.

C. Even if arbitrariness of the Selective Service boards were a defense in a criminal proceeding, petitioner would not be in a position to benefit. His offer of proof did not even charge that the board of appeal, which made the effective classification after considering petitioner's status *de novo*, was prejudiced against him or refused to consider his evidence. His offer did not raise the

issue of the sufficiency of the evidence because he offered only the portions of the file which were in his favor, which was not all on which the boards relied. To make a sufficient offer of proof regarding insufficiency of the evidence petitioner should have offered his entire file in evidence, as this Court has held in analogous cases. Petitioner's plea in abatement also fails to raise these issues adequately. It attests petitioner's preoccupation at the trial with a reclassification *de novo* by the jury or judge, and with the alleged prejudice of the local board. On its face it is insufficient also because it would establish, contrary to the fact, that petitioner failed to exhaust his administrative remedies.

D. The charge that the Selective Service System has discriminated against Jehovah's Witnesses is unfounded. Selective Service at the outset displayed the utmost liberality in classifying Witnesses as ministers and accepted without question or investigation the list prepared by the Watchtower Bible and Tract Society certifying some 1,000 registrants as ministers. Petitioner's name was not on this list. This acceptance was discontinued only when the names sought to be added to the list multiplied almost overnight and it became apparent that safeguards should be taken against abuse. Notwithstanding, Selective Service has continued to give the problem fair, unprejudiced consideration.

ARGUMENT

A. Neither the statute nor the Constitution gives petitioner a right to a *de novo* trial by either the jury or the judge of his classification under the act and regulations

As shown in the Statement, *supra*, pp. 5-6, petitioner's claim that he was a minister of religion was considered and rejected by both the local board and the board of appeal, and the latter classified him in Class IV-E as a conscientious objector. Petitioner would accord this determination no more than interlocutory effect, for he contends that he was entitled by noncompliance with the consequent order to report, followed by arrest and indictment, to have either the jury or the judge try *de novo* the question whether he was a minister. He sought at the trial to show both by documents which were submitted to the boards and by additional evidence that he was in fact a minister; in addition, he requested the court to charge the jury that if the jury found that he was a minister and that the boards had knowledge of this, the jury should acquit him (R. 42-43). Surely, we submit, the exclusion of evidence seeking to retry before the jury the issues which were to be resolved under the statute by the Selective Service boards was entirely proper. Moreover, petitioner sought by plea in abatement (R. 3-5), and by motion to dismiss (R. 6-7), to have the judge proclaim him a minister, presumably as a matter

of law. We submit that the judge properly declined.

Trial de novo before the jury.—The statute commits to the local boards the power to hear and determine, subject to the right of appeal to the appeal boards, "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards," and provides that the decisions of the local boards "shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe" (Sec. 10 (a) (2), Appendix A, *infra*, pp. 81-82). The Act contains no provision for review in the courts of a Selective Service classification. It contemplates that resort will be had to the courts only in the enforcement of the Act. Section 11, which makes criminal the knowing failure to perform any duty required by the Act or the rules and regulations made under it, confers jurisdiction on the courts to try one charged with such offense. It makes no provision for examination by the courts into matters antecedent to the failure to perform the duty. This silence, the whole scheme of the statute to accomplish its purpose, and the power lodged in the courts to enforce and that alone, are together conclusive of the Congressional plan. Administrative action must inevitably have been taken, in most cases, prior to the imposition of the

specific duty to be performed. The conclusion seems inescapable, therefore, that Congress intended that the classification of a registrant by the Selective Service boards would be final and not subject to examination by the courts in a prosecution of a registrant for failure to perform the duty required of him pursuant to his classification. A court in reviewing an administrative determination, will not retry the merits *de novo* in the absence of specific statutory authority to do so, notwithstanding express statutory authority, absent here, to review the determination (cf. *Tagg Bros. v. United States*, 280 U. S. 420, 443-444) and this settled doctrine is of particular force here in view of the above-quoted provisions of the Selective Training and Service Act of 1940.

Petitioner argues, however, that the rule of finality of an administrative factual determination applicable in civil review proceedings does not apply in a criminal prosecution for violation of an administrative order, where the accused is presumed to be innocent and the burden rests upon the Government to prove him guilty beyond a reasonable doubt (Br. 58-60, see also Br. 27-39, 56). But one accused is presumed to be innocent of the offense with which he is charged—here disobedience of the order to report. The presumption does not include a presumption that an order valid on its face is invalid, but only that petitioner did not knowingly fail or neglect to per-

form the duty which the order enjoined upon him. Nor does due process require that the defendant in a criminal prosecution under the Act shall be permitted to have the jury, rather than the boards, pass upon his classification, for it is settled that Congress may entrust to administrative agencies the function of determining the facts in matters arising between the Government and persons subject to its authority, and may invest the determinations of such agencies with the quality of finality even where criminal consequences are brought into play by the determination. See *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 180; *Crowell v. Benson*, 285 U. S. 22, 50-51, and the dissenting opinion of Mr. Justice Brandeis, at p. 77.⁹ Indeed, the contention has long since been rejected by this Court in the case of a criminal prosecution for failing to comply with an order of the Secretary of War to alter a bridge over a navigable waterway which the Secretary had found, pursuant to the authority vested in him by statute, constituted an unreasonable obstruction of navigation. In *Monongahela Bridge v. United States*, 216 U. S. 177, 195, this Court said:¹⁰

⁹ Contra, *Richter v. State*, 16 Wyo. 437; *State v. Raczkowski*, 86 Conn. 677; and *Crane v. State*, 5 Okla. Cr. 560, relied on by petitioner (Br. 35, 37).

¹⁰ See also *Union Bridge Co. v. United States*, 204 U. S. 364; *Hannibal Bridge Co. v. United States*, 221 U. S. 194. The Court also stated, in the *Monongahela Bridge* case, that in the event of arbitrary action the courts are not powerless to

It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. [*Italics the Court's.*] ¹¹

Trial de novo by the judge.—Petitioner also argues, in effect (Br. 60-64), that his claim that he was a minister was tantamount to a denial of the jurisdiction of the local board to order him to report for service under the Act and that he was entitled to a *de novo* trial by the judge of this issue of jurisdiction.

At the outset it should be noted that, contrary to petitioner's suggestion (see Br. 62), no distinc-

devise a remedy. We point out hereinafter (pp. 32-33) that habeas corpus is available after induction to test whether actions of Selective Service are arbitrary.

¹¹ Petitioner also suggests (see Br. 99-102) that his proffered evidence that he was in fact a minister should have been admitted so as to enable the jury to determine whether his Selective Service classification was arbitrary because not founded on evidence. But even were that question open in the criminal prosecution for failure to comply with the order to report (an issue we discuss *infra* pp. 27-57), it was a question solely of law which was not for the jury to decide. See *F. F. C. v. Bankers Trust Co.*, 318 U. S. 163, 170.

tion in this regard can be made between claims for deferment and claims for an exempt-status. The Act gives the local boards authority to determine, subject only to the right of administrative appeal, all claims for exemption or deferment from training and service, including claims for exemption as a minister;¹² their jurisdiction under the statute is therefore not affected by the nature of the claim asserted. Hence the same issue would be presented in the case of a registrant who claimed to be a conscientious objector to combatant military service (Class I-A-O), or to both combatant and noncombatant military service (Class IV-E) as did petitioner, or who claimed deferment as a person with dependents (Class III), or physically unfit (Class IV-F), or in an essential occupation (Class II). In all such cases the boards are required to conform to the regulations promulgated for their governance and they are equally bound in one case as in another to recognize a claim for exemption or deferment

¹² This Court has held that the exemption conferred on ministers is entirely statutory and is not compelled by the Constitution, *Jacobson v. Massachusetts*, 197 U. S. 11; *Hamilton v. Regents*, 293 U. S. 245, 266; *United States v. Macintosh*, 283 U. S. 605, 623-624; *Ruse v. United States*, 129 F. (2d) 204, 210 (C. C. A. 6.). In the *Jacobson* case it was said: " * * * [a person] may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. * * * " (197 U. S. 11, 29.)

which comes within the applicable regulation. It is equally true that in respect of all such claims the Selective Service System is the final statutory arbiter of issues of fact relating to the registrant's proper classification.

It follows from this, we think, that no issue of the "jurisdiction" of Selective Service is involved in the denial of a claim to an exempt status. See *Shields v. Utah Idaho R. Co.*, 395 U. S. 177, 184.¹³ The question whether petitioner was a minister was one which the boards had the power and duty under the Act to determine. They had jurisdiction of petitioner and of the subject-matter and any error in determining his claim does not impair that jurisdiction.¹⁴

Crowell v. Benson, 285 U. S. 22, which petitioner invokes, has no application here. The rule of that

¹³ The question in the *Shields* case was whether an electric railroad was "excepted" from the scope of the Railway Labor Act. The answer turned on whether the railroad was an interurban railroad not operated as a part of a general steam railroad system of transportation. This Court held it error for the district court to try the question *de novo*; and that the rule of finality of administrative decisions applied. Hence if on the record before the Interstate Commerce Commission the determination of the latter was supported by substantial evidence, the administrative determination was to be upheld, notwithstanding that the question was one of exemption.

¹⁴ *McLean v. Jephson*, 123 N. Y. 142; *Stevens, Landowner*, 228 Mass. 368; *State v. Lamos*, 26 Maine 258; *Spencer & Garder v. People*, 68 Ill. 510; *People v. McCoy*, 125 Ill. 289, 297; *State v. Weimer*, 649 Iowa 243; *State v. Kirby*, 120 Iowa 26, relied on by petitioner (Br. 35, 36) are thus not in point since they endorse a judicial review to determine only that the administrative agency had jurisdiction to act.

decision, in respect of the judicial duty to hear and determine *de novo* issues of fact underlying the jurisdiction of administrative tribunals, is narrowly confined to issues touching matters of fundamental or constitutional right or power, or, in other words, issues of fact which are jurisdictional in the constitutional sense. *Shields v. Utah Idaho R. Co.*, *supra*, at 184-185. Compare *Davis v. Department of Labor and Industries*, 317 U. S. 249, 256-257; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51. No such issue is involved in a Selective Service classification. Petitioner claims no constitutional right to exemption or deferment from the obligation to render military service and, since it is clear the boards had jurisdiction, no issue is tendered for a *de novo* trial by the judge.¹⁵

B. Neither the statute nor due process requires that the judge determine whether the registrant's classification was based on evidence and a fair consideration as a condition precedent to the registrant's conviction for disobedience of the order to report

Petitioner contends in the alternative, however, that at the least he was entitled to a review by the judge of the evidence upon which his classification was founded (Br. 64-66; see also Br. 94-95). He contends that, despite the mandate of the statute, Selective Service determinations are invested with no greater degree of finality than are the decisions of other administrative tribunals whose decisions on matters of fact are expressly made subject to

¹⁵ See footnote 12, *supra*, p. 25.

judicial review, and that a registrant may, if he thinks his classification is erroneous, elect to disobey an order to report and seek to have the classification set aside in the consequent criminal prosecution for arbitrary classification or lack of evidence to support it. We think petitioner cannot prevail in this contention.

The question sought to be raised in *Bowles v. United States*, 319 U. S. 33, was similar, but that case was decided on other grounds. The question did not arise under the 1917 draft law since criminal sanctions were not utilized in the last war for failure to report for induction. Rather, under the 1917 Act and regulations, a registrant was considered to be inducted and subject to military law immediately from the time designated to report. If he failed to report, he was subject to court martial for desertion. Articles of War, Sec. 2a, 41 Stat. 787, 10 U. S. C. 1473; Selective Service Regulations (1917) Secs. 133, 140; *Franke v. Murray*, 248 Fed. 865 (C. C. A. 8); cf. *United States v. Bullard*, 290 Fed. 704, 707 (C. C. A. 2), certiorari denied, 262 U. S. 760.¹⁶ Accordingly, the question of available de-

¹⁶ Section 11 of the 1940 Act provides that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted." This provision was a Senate floor amendment, eliminating a provision giving the civil and military courts concurrent jurisdiction. The purpose of the amendment was to maintain civil jurisdiction until the end of the process of selection; there is nothing in its history to indicate, how-

fenses in a criminal proceeding for failing to report for induction was not presented.¹⁷

Nor is the problem presented in Great Britain. Under the British National Service (Armed Forces) Act, 1939, 2 and 3 Geo. VI, Ch. 81, judicial review is not possible since that statute provides, in respect of matters committed to the determination of the various agencies established for its administration, that the decisions of such

ever, that the *defenses available* were to be expanded.—See 86 Cong. Rec. 10895, 11710, 12039, 12084. In the House the purpose was stated as follows: "We should not let a military court determine whether a military court martial has jurisdiction of the draftee." 86 Cong. Rec. 11710. In the Senate the author of the provision stated that it would substitute the civil courts for the military courts. 86 Cong. Rec. 10895.

¹⁷ But in habeas corpus proceedings brought by registrants who had not reported for induction, it was held that erroneous classification did not justify a refusal to report. See cases cited, *infra*, p. 49. Under the 1917 Act, the Judge Advocate General repeatedly ruled that a plainly mistaken classification did not void the induction and accordingly the registrant was required to apply to the military for discharge. JAG 334.4, June 7, 1918; JAG 327.3, October 30, 1918, November 9, 1918. And an erroneous classification was held no defense in a court martial for desertion arising out of failure to report for induction. See C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912-1930), in which it was stated—

"While it is true there was no direct evidence that the accused was registered or classified, the order to entrain and proceed to camp is established beyond all doubt. The order imports rightfulness and verity as against any assault in these proceedings" (C. M. #122330, Choroshen; C. M. #114991, Aniki).

agencies shall not be called in question in any court of law (Secs. 5 (12), 6 (9), 10 (2)).¹⁸

1. THE SCHEME OF THE STATUTE AND THE EFFECTUATION OF ITS GREAT PURPOSES, AS WELL AS PRACTICAL CONSIDERATIONS, REQUIRE THAT THE REGISTRANT REPORT AS ORDERED AND THEN SEEK JUDICIAL REVIEW IN HABEAS CORPUS

The Government's position.—We believe that the statute does not permit, and considerations of due process do not require, that the district court in a prosecution for violation of an order to report constitute itself into a tribunal to review the defendant's classification. The pattern of the statute in making the Selective Service determination final, without any provision for judicial review, and in imposing criminal sanctions for disobedience of an order to report, manifests a purpose, as we have shown (*supra*, pp. 21-22), to exclude judicial review in the criminal prosecution. Consistently with the great purpose in time of national peril to raise armed forces by a system of selective compulsory training and service, the intent and scheme of the statute is that the order to

¹⁸ This statement is not, however, applicable to those claiming to be ministers since they are not required to register (Sections 2 and 11 (1)) and therefore are not classified by any administrative agency. In prosecutions for failure to register, it would seem that the courts must decide whether the defendant is a minister. Under the 1916 Acts ministers were required to register (National Registration Act (1915) 5 & 6 Geo. V. ch. 60, sec. 1) but not to serve (Military Service Act (1916) 5 & 6 Geo. V., ch. 104, schedule 1) and were not classified administratively (see sec. 2 (1)); thus the cases arising under it relied on by petitioner are inapposite (Br. 32, 72): In this connection see footnote 71, *infra*, pp. 77-78.

report must be obeyed. This central purpose and the plan which Congress has adopted for its effectuation should not, we submit, be weakened by adopting the course which petitioner advocates, whereby the registrant is permitted to choose the penitentiary even if his classification is upheld. We recognize that where, as here, Congress has not ~~recognize that where, as here, Congress has not~~ provided for judicial review, the courts are nevertheless not powerless to set aside an arbitrary or capricious administrative determination. See *Ng Fung Ho v. White*, 259 U. S. 276; *Gegiow v. Uhl*, 239 U. S. 3; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. Cf. *R. F. C. v. Bankers Trust Co.*, 318 U. S. 163.¹⁰ But we think that the statutory purpose and scheme can be preserved and the rights of the registrant under the Act protected against abuse in the administrative process by re-

¹⁰ *Wise v. Withers*, 3 Cranch 330, a tort case relied on by petitioner, cannot aid him. Under a statute requiring the enrollment in the militia of all able-bodied white men between the ages of 18 and 45, except those exempt from military duty by the laws of the United States, which laws exempted executive and judicial officers, the question was whether the plaintiff, a justice of the peace, was exempt. Holding that a justice of the peace was an officer, executive or judicial, or both, of the United States, the Court held plaintiff exempt from military jurisdiction. There was no question plaintiff was a justice of the peace. No administrative agency existed to decide questions of exemption. Nor does the case touch on the way the legal point there involved may be raised in time of national peril. In *Fire Department v. Gilmour*, 149 N. Y. 453 (and see *People v. McCoy*, 125 Ill. 289), also relied on by petitioner (Br. 35), the question involved could have been raised in no other way.

quiring that he report and then, if accepted, seek review of his classification in habeas corpus. This course effectuates the purpose and plan of the Act; the course which petitioner advocates would tend to destroy both. Considerations of due process, as applied to this problem, are given full effect if a remedy be available after the whole Selective Service process, including reporting and ultimate acceptance, has been completed. The military needs of the nation do not presently forbid such a remedy. Accordingly, the Government has not contested the availability of habeas corpus, after induction for military service or civilian service of national importance, to test whether the draft agencies have accorded due process.²⁰ Consideration for the rights of the individual in relation to the public interest in time of national peril, and for the integrity of the Congressional scheme, requires no more; individual rights do not require that the order to do service may be disobeyed with impunity, save perhaps under circumstances of complete absence of jurisdiction. The order to do service is not a penalty; it is a call to fulfill an obligation owed by the citizen. (Act of April 22, 1898, 30 Stat. 361, 10 U. S. C. 1.)

²⁰ The courts have held under the present Act that the registrant must obey the order and seek review in habeas corpus to test the validity of his classification. *United States v. Bowles*, 131 F. (2d) 818 (C. C. A. 3), affirmed on another ground, 319 U. S. 33; *United States v. Grieme*, 128 F. (2d) 811 (C. C. A. 3); *Fletcher v. United States*,

Our position is supported by every consideration relevant to the problem: the careful and comprehensive procedure prescribed by the Act and regulations for the classification and selection of persons for military service and work of national importance, the practical requirements of the process, and considerations of orderly procedure, all impel the conclusion that a registrant may not choose to defy an order to report of which he has notice merely because he thinks that his classification is arbitrary. Review in habeas corpus after induction preserves the Congressional scheme, aids the great purposes of the Act, and at the same time affords protection against abuse. Due process requires no more.²¹

129 F. (2d) 262 (C. C. A. 5); *United States v. Kauten*, 133 F. (2d) 703 (C. C. A. 2); *United States v. Mroz*, 136 F. (2d) 221 (C. C. A. 7). Cf. Mr. Justice Douglas, concurring, in *Hirabayashi v. United States*, *infra*, at p. 20. No circuit court of appeals has held contrary to our view, although in some cases, the courts assuming but not deciding that collateral attack in a criminal proceeding was permissible, have found no justification on the merits for judicial intervention. See *Seale v. United States*, 133 F. (2d) 1015 (C. C. A. 8); *Rase v. United States*, 129 F. (2d) 204, 207 (C. C. A. 6); *Chechinski v. United States*, 129 F. (2d) 461 (C. C. A. 6); *Buttecali v. United States*, 130 F. (2d) 172, 173 (C. C. A. 5); *Barley v. United States*, 134 F. (2d) 998 (C. C. A. 4); *Goff v. United States*, 135 F. (2d) 610 (C. C. A. 4); *Honaker v. United States*, 135 F. (2d) 613 (C. C. A. 4); cf. *Johnson v. United States*, 126 F. (2d) 242 (C. C. A. 8).

²¹ "The Constitution as a continuously operating charter of government does not demand the impossible or the im-

The statutory scheme.—The Act, as we shall show in some detail (*infra*, pp. 35–37), creates a Selective Service System of local and appeal boards to determine who shall be exempted or deferred, and who shall be called. Section 10 (Appendix A, *infra*, pp. 81–82) provides that the decisions of the local boards shall be final, save as appeals within the System are authorized by the President. Section 11 (Appendix A; *infra*, pp. 82–83), in turn makes it a crime to disobey an order issued under the Act.

Petitioner would add exceptions to Section 10; he would have the section provide that the decision is final in requiring compliance only if supported by substantial evidence. And he would amend Section 11 to forbid disobedience only of orders which are ultimately found by the courts to be based upon such evidence. The text of the Act has not so provided. Whatever the exceptions which the courts have built upon statutory exemption from review,²² we submit that at the least the finality provided by Section 10 protects Selective Service deferments from collateral attack in a criminal proceeding. This would seem to be

practical." Mr. Chief Justice Stone in *Hirabayashi v. United States*, No. 870, October Term, 1942, slip opinion, p. 17.

"Peacetime procedures do not necessarily fit wartime needs." Mr. Justice Douglas, concurring in *Hirabayashi v. United States*, *supra*, slip opinion, p. 19.

²² *Gegione v. Uhl*, 239 U. S. 3; *Silberschein v. United States*, 266 U. S. 221, 225; see Selective Service cases cited, footnote 41, *infra*, pp. 50–51.

made plain by the requirement of Section 11 that Selective Service orders must, without exception, be obeyed.

This conclusion is supported by the entire scheme of the Act and of the procedure provided for the classification of registrants. Analysis of the Act, its operation, the functions which must be performed under it, and the Selective Service regulations, establishes that its efficacy would be substantially impaired by the course which petitioner urges.

The Act requires all male citizens and all male persons residing in the United States, between the ages of 18 and 65, to register (Sec. 2). All such persons between 18 and 45 are liable for training and service in the armed forces (Sec. 3).²³ Men are to be selected for training and service, under such rules and regulations as the President may prescribe, from those who are liable and who are not deferred or exempted (Sec. 4). Section 5 (e) provides for exemption and deferment of certain groups; it also empowers the President to provide for the deferment of persons for occupational reasons, for physical reasons, or because of dependency, but all such deferments must be made upon an individual and not a group basis. Sec-

²³ Originally, the age limits were 21 to 36. The Act of December 20, 1941, 55 Stat. 844, Sec. 2, amended the age limits to 20 and 45. The Act was amended to its present form on November 13, 1942 (56 Stat. 1018).

tion 5 (g) provides for the relief of conscientious objectors from combatant training and service or from any military training and service (Appendix A, *infra*, pp. 79-81). Section 10 (Appendix A, *infra*, pp. 81-82) authorizes the President to create a Selective Service System; the President is directed to provide for classification of registrants and to establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary. The local boards are to be composed of three or more members appointed by the President, and they are to have power to hear and determine, subject to administrative appeal, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service of all individuals in their jurisdiction. The decisions of the local boards are final except where an appeal is authorized. Under Section 11 (Appendix A, *infra*, pp. 82-83), any person who knowingly fails or neglects to perform any duty required of him by the Act, or by its rules or regulations, shall, upon conviction in the district court, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

Under the Act there have been established 6,442 local boards, the same number of appeal agents,²⁴ 274 appeal boards and 42 coordinate ap-

²⁴ An appeal agent may appeal from any classification by a local board in any case where he believes review is warranted; it is also his duty to assist ignorant registrants, and

peal boards.²⁵ As of August 31, 1943, the registrants under the Act totalled 43,195,972, of whom 29,192,859 were liable for military training and service (i. e., were between the ages of 18 and 45).²⁶ Since a classification is not permanent and is subject to being reopened at any time,²⁷ the process of classification is continuous. Thus, for example, between July 1, 1942 and July 1, 1943, 41,969,644 classification actions were taken on registrants, while 3,827,378 were taken in January 1943, alone. By September 1, 1943, 6,514,635 men had entered the armed services through the Selective Service System.²⁸

The process of selection begins with registration and ends with acceptance by the armed forces or for work of national importance. The initial

to suggest to the local board a reopening, or to make an investigation and submit information to the board, in any case where the interests of justice may require (Reg. 603.71). See Lewis, *Appeal Procedure Under the Selective Service Law* (1942), 17 Ind. L. J., 273, 275-278.

²⁵ Second Report of Director of Selective Service, 1941-42, *Selective Service in Wartime* (1943), p. 504. Each local board covers an area of, about 30,000 population, but there must be at least one separate local board in each county. Regulation 603.51. The average number of registrants per local board in the first and second registrations was 2,757, varying from one board with 57 registrants to one with 8,709. *Selective Service in Peacetime*, pp. 59-61.

Each appeal board shall cover not more than 70,000 registrants. Regulation 603.21.

²⁶ Figures compiled from Selective Service records.

²⁷ See Sec. 5 (h) of the Act; Regulation 626.1.

²⁸ Figures compiled from Selective Service records.

step after registration is the registrant's receipt (if he is between the ages of 18 and 45), filling out, and return to the local board of the questionnaire, which petitioner executed on August 23, 1941.²⁹ The registrant is entitled to present all written information which he believes necessary to assist the local board in determining his classification; this information is to be included in or attached to the questionnaire. (Reg. 621.4).³⁰ There is a space on the questionnaire in which a registrant may make his claim to be a conscientious objector (see R. 56); if he so claims, he is furnished a special form to substantiate his claim, and this form becomes a part of the questionnaire (Reg. 621.3).

Upon receipt of the questionnaire, the local board proceeds to classify the registrant solely upon the basis of the written information in his file (Reg. 623.1, 623.2). Unless placed in certain deferred classes, the registrant is then physically examined by local board examining physicians.³¹

²⁹ R. 58. For the method of determining the order in which registrants shall receive their questionnaires, see *Selective Service in Peacetime*, pp. 89-99.

³⁰ This Regulation and each other one hereinafter referred to are set forth in Appendix B, *infra*, pp. 84-117.

³¹ Since January 1, 1942, this physical examination has been cursory, and designed to eliminate only those visibly unfit (See Reg. 623.33). In the case of a registrant called for military service the main examination is conducted at the induction station upon reporting for induction. See, *infra*, pp. 43, 54. A registrant finally classified in Class IV-E as a conscientious objector is given a final type physical examina-

A registrant claiming to be a conscientious objector (Class IV-E or I-A-O)³² is in any event examined at this point (Reg. 623.21, 623.31), and his claim is not passed upon unless it appears upon this preliminary physical examination that he is physically fit for service (Reg. 623.51 (c)).

Thereafter, the registrant receives a notice of the classification by the local board (Reg. 623.61). Upon receipt of such notice, the registrant may, upon written request within ten days, ask for an appearance before the local board (Reg. 625.1). If request is made, time for appeal is stayed (Reg. 625.2 (e)), and the local board must send a notice of time and place for the appearance, at which the registrant may submit such additional information and make such additional presentation as he wishes. All such information must be reduced to writing and placed in the registrant's file (Reg. 625.2).

If the registrant's requested classification is denied, he may appeal (Reg. 625.2 (e), 627.2 (a)). In addition, the Director of Selective Service, the State Director of Selective Service, or the government appeal agent may also appeal from the local board determination (Reg. 627.1 (a), 627.2 (a)).

tion at an induction station before he is assigned to work of national importance (Reg. 651.1); see *infra*, pp. 44-56.

³² A registrant found to have conscientious objections to all military service is placed in Class IV-E; one found to object to combatant service only is classified I-A-O. Regs. 622.12, 622.51.

The appeal results in a *de novo* consideration by the appeal board. Appeal is taken by filing a written notice, or by signing the "Appeal to Board of Appeal" upon the questionnaire (Reg. 627.11); the registrant may attach to his appeal a statement of the respects in which he believes the local board erred, may direct attention to any information in his file which he believes the local board failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which that board failed or refused to include in his file (Reg. 627.12). If the information is not sufficient to enable the appeal board to determine the registrant's classification, the file is returned to the local board with proper instructions (Reg. 627.23). In transmitting the file to the appeal board the local board "should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision" (Reg. 627.13 (a)). The taking of appeal automatically stays induction (Reg. 627.41).

A special procedure upon appeal is provided by Section 5 (g) of the Act (Appendix A, *infra*, pp. 79-81) and by Reg. 627.25 for persons who assert conscientious objections, and this procedure was followed in petitioner's case (see R. 58). The appeal board makes a preliminary examination of the file to determine whether the regis-

trant should be placed in a deferred or exempted class other than the conscientious objector class. If it decides that he should not be so placed, the board of appeal must transmit the file to the local United States Attorney. The Department of Justice must then make an inquiry and hold a hearing, of which the registrant is given notice, on the character and good faith of the registrant's conscientious objections. Upon the basis of such inquiry, the Department submits a report and its recommendations to the appeal board. Under Section 5 (g) of the Act, as well as the regulations (627.25 (c)), the appeal board must give consideration to, but is not bound by, the recommendation of the Department of Justice.

The appeal board then makes its classification and returns the case to the local board (Reg. 627.26, 627.27), which notifies the registrant of the appeal board's action (Reg. 627.31). The decision of the appeal board may, however, be subject to further appeal upon certain conditions. Appeals as of right to the President may now be taken by the registrant in any case where he is classified as available for military service (I-A) or as a conscientious objector (I-A-O or IV-E) and one or more members of the board of appeal dissented from the classification (Reg. 628).³³

³³ At the time of petitioner's classification, appeals as of right were limited to dependency cases in which there was a dissent. In this case, the action of the appeal board was unanimous (R. 58), and petitioner did not claim dependents.

In addition, in any other case, the State Director of Selective Service or the Director of Selective Service may appeal, if either "deems it to be in the national interest or necessary to avoid an injustice." Reg. 628.1.³⁴ If such appeal is taken, the registrant is notified; he is also notified of the President's decision (Reg. 628.4 (a), 628.6). Appeal to the President stays induction (Reg. 628.7).

If the registrant is classified I-A, and the local board determines that he shall report, he is sent an Order to Report for Induction (Reg. 633.1). Section 3 of the Act, however, expressly provides that—

³⁴ Petitioner's Selective Service file shows that in May 1942, subsequent to his hearing before the Department of Justice hearing officer but prior to his reclassification in Class IV-E by the appeal board (see R. 58), he communicated with National Headquarters of Selective Service claiming that he had been improperly classified and should have been placed in Class IV-D as a minister. On June 25, 1942, which was subsequent to petitioner's classification in Class IV-E by the appeal board, National Headquarters advised the Acting State Director of this and stated that petitioner's name was not on the "certified list of Jehovah's Witnesses" and that there was nothing in the correspondence which would warrant action by the Director of Selective Service. On the same date the Acting State Director advised petitioner of this communication from National Headquarters and of the fact that the appeal board had unanimously classified him in Class IV-E. He also stated in his letter to petitioner that he had received the file and reviewed the facts of the case and that in his opinion they did not "warrant an appeal to the President;" he accordingly declined to take such an appeal.

* * * no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * *

Accordingly, the registrant is, upon reporting at the induction station, subjected to a final physical and mental examination.³⁵ Only the selected men who are found acceptable in such examination are inducted into the armed forces (Reg. 633.9). Upon receiving notice that a registrant has been found acceptable and has been inducted, the local board places him in I-C; if he is not accepted because of unfitness, he is placed in IV-F (Reg. 633.13; see Reg. 633.10 (c)). It is not until after this step is taken that the Selective Service classification is complete.

Even after induction, however, the individual who may have been erroneously classified and inducted is not without administrative remedy. By War Department Circular No. 270, December 27, 1941, it was provided that if a man was erroneously inducted because of the denial of "some legal right" in the course of the procedure leading up to induction, he would be separated from service upon his written request and after report and recommendation of the individual's local

³⁵ *Selective Service in Peacetime*, pp. 132, 209; see *infra*, p. 54.

board and of the State Director of Selective Service. Under Army Regulations 615-360, an individual may also be discharged if he is "inapt" or if he "does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify or reassign" him (Par. 51).³⁶

If the registrant is classified IV-E as a conscientious objector to both combatant and non-combatant military service the procedure for assignment to work of national importance is somewhat different. In that case, when his order number is reached in the process of selecting I-A and I-A-O registrants to report for induction into the armed forces, the registrant is summoned for a final type physical examination at the induction station in the same manner as that conducted for other selected men (Reg. 651.1-651.8). If the report of the examination indicates that he is physically and mentally qualified for service, the local board notifies the Director of Selective Service that he is acceptable for work of national importance (Reg. 651.10 (a), 652.1). The Director then assigns the registrant to a camp and upon receipt of such assignment the local board issues an order to the registrant to report for work of national importance (Reg. 652.2, 652.11; see R. 59) and it is his duty to comply with the order (Reg. 652.11).

³⁶ Under Selective Service Regulation 653.16, similar discharges may be granted to registrants assigned to work of national importance.

It will thus be seen that the task of selection is an enormous undertaking, and that the procedure is comprehensively designed from beginning to end to provide maximum safeguards against error.

Were the procedures of selection haphazard and incomplete, and lacking in substantial assurance against error in classification, it might more persuasively be argued that an order to report for induction or for work of national importance should impose no obligation to respond. The situation is otherwise, however, where, as here, the procedure is elaborate and complete, creating the strongest likelihood that the final classification is correct. In these circumstances, we submit that a registrant may fairly be put to the duty, as the statute requires, of responding to an order so made.

The importance of preserving the administrative process.—The conclusion that the process of selection should not be interrupted until its completion is supported by strong practical considerations as well as by the statutory scheme. As we have noted, the task of classifying registrants is enormous, yet no governmental function more imperatively requires expedition and freedom from harassing litigation than the function of raising military forces in time of war. The procedure of judicial review in a criminal prose-

cution which petitioner insists upon would, we submit, obstruct that function and be fruitful of crippling delays. In this very case petitioner was originally classified as available for military service by his local board on January 19, 1942; he was not finally classified, after appeal, and ordered to report for work of national importance until September 2, 1942 (R. 58, 59), and more than one year has elapsed since he was scheduled to report. The fact that his claim of conscientious objection was sustained on appeal and he was therefore not subject to induction into the armed forces is of no moment, for the same procedure would be open to those registrants who are selected for induction. It would seem clear that in either event completion of the processes contemplated by the statute and regulations, and the summary remedy of habeas corpus, provides a more clear-cut and expeditious procedure.

For, if armed forces are to be effectively raised as the peril demands, a registrant who believes his classification unlawful must not be permitted to attack it from a position where, if he fails, he goes to jail instead of into the armed services. A man in jail is of no use to his country's defense.³⁷ It is of particular importance that one who is

³⁷ Cf. testimony of Secretary of War Baker, Hearings before House Committee on Military Affairs on the Selective Service Act of 1917, 65th Cong., 1st Sess., p. 81: "We cannot afford to allow a man the alternative" of prison or service.

called up respond promptly. As this Court stated in *Houston v. Moore*, 5 Wheat. 1, 35:

* * * the honor and peculiar safety of a particular state may so often be dependent upon the alacrity with which her citizens repair to the field, that the most serious mortifications and evils might result, from refusing the right of lending the strength of the state authority to quicken their obedience to the calls of the United States.

Practical necessity withholds permission from a registrant to disregard an order to report because he thinks the order is wrong, putting the burden upon the Government to seek him out and proceed against him. The order to report must be obeyed; for, as Mr. Justice Story said (*Martin v. Mott*, 12 Wheat. 19):

The power [to call up a militia] thus confided by congress to the president, is, doubtless, of a very high and delicate nature. * * * If it be a limited power, the question arises, by whom is the exigency to be judged and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question * * * equally open to be contested by every militiaman who shall refuse to obey the orders of the president? * * * A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service,

and the command, of a military nature; and
 * * * every obstacle to an efficient and
 immediate compliance, necessarily tend to
 jeopard the public interests. While subor-
 dinate officers or soldiers are pausing to
 consider whether they ought to obey, or
 are scrupulously weighing the evidence of
 the facts upon which the commander-in-
 chief exercises the right to demand their
 services, the hostile enterprise may be ac-
 complished, without the means of resist-
 ance. * * * (Pp. 29-30.)

* * * * *

The law contemplates that, under such cir-
 cumstances, orders shall be given to carry
 the power into effect; and it cannot, there-
 fore, be a correct inference, that any other
 person has a just right to disobey them.

* * * It is no answer, that such a
 power may be abused, for there is no power
 which is not susceptible of abuse. * * *

(Pp. 31-32.)³⁸

Petitioner's assertion (Br. 66) that the order to
 report was void and imposed no duty cannot pre-
 vail. It is a familiar part of our law that an
 administrative order, even if it may be erroneous
 and ultimately superseded by the judiciary, may
 nevertheless not be void and without legal force.
Cf. Texas and Pacific Ry. v. Abilene Cotton Oil
Co., 204 U. S. 426, 440-441; *Myers v. Bethlehem*

³⁸ Cf. *McCull's Case*, 5 Phila. (Pa.) 259 (1863), in which
 it was stated (p. 264) that "drafting would not [be] effectual
 without a power to compel the attendance of those drafted."

Shipbuilding Corp., 303 U. S. 41; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501; *Piuma v. United States*, 126 F. (2d) 601 (C. C. A. 9), certiorari denied, 317 U. S. 637; *Inghram v. Union Stockyards Co.*, 64 F. (2d) 390 (C. C. A. 8); *Lehigh Valley R. Co. v. United States*, 188 Fed. 879 (C. C. A. 3).³⁹

An order to report for induction, like other interlocutory administrative orders, may not be disregarded even though it may be erroneous. Thus, under the 1917 Act, it was held that where the draft board which ordered a registrant to report had jurisdiction over the registrant, defiance of the order constituted desertion⁴⁰ even though the registrant was not fairly heard by the draft board. For, "Although based on irregular proceedings, it was not void. Until vacated, it was binding on the petitioner." *Ex Parte Romano*, 251 Fed. 762, 764 (D. Mass.); *Ex Parte Tinkoff*, 254 Fed. 912

³⁹ Similarly, an injunction, even though legally erroneous, nevertheless may attain such validity as to require compliance. *Howat v. Kansas*, 258 U. S. 181, 189-190; *McLeod v. Majors*, 102 F. (2d) 128, 129 (C. C. A. 5); *Locke v. United States*, 75 F. (2d) 157, 159 (C. C. A. 5); see *McCann v. New York Stock Exchange*, 86 F. (2d) 211, 214 (C. C. A. 2), certiorari denied, 299 U. S. 603. And a prisoner in a penal institution under an irregular and voidable sentence is not entitled to attack the sentence by escape from prison; if he does, despite the illegality of his imprisonment, he has committed a criminal offense. *Aderhold v. Soileau*, 67 F. (2d) 259 (C. C. A. 5).

⁴⁰ See, *supra*, p. 28, for the 1917 Act procedure; cf. *United States v. Bullard*, 290 Fed. 704, 707 (C. C. A. 2), certiorari denied, 262 U. S. 760.

(D. Mass.); see cases cited *supra*, p. 28. Similarly, a registrant who was inducted could not thereafter desert and attack the validity of his induction upon court martial for desertion. *Ex parte Kerekes*, 274 Fed. 870 (E. D. Mich.); cf. *Aderhold v. Soileau*, 67 F. (2d) 259 (C. C. A. 5).⁴¹

⁴¹ Although perhaps varying in their views concerning the precise subjects and scope of review, the courts have uniformly indicated, in cases arising out of the Civil War draft act, the 1917 draft act, and the present act, that habeas corpus after induction is appropriate to test the validity of actions of the draft boards. E. g. 1863 draft act: *Stingle's Case*, Fed. Cas. No. 13458 (E. D. Pa.); 1917 act: *Arbitman v. Woodside*, 258 Fed. 441 (C. C. A. 4); *Ex Parte Hutfis*, 245 Fed. 798 (W. D. N. Y.); *United States v. Rauch*, 253 Fed. 814 (S. D. N. Y.); 1940 Act: *Rase v. United States*, 129 F. (2d) 204 (C. C. A. 6); *United States v. Grieme*, 128 F. (2d) 811 (C. C. A. 3); *United States v. Kauten*, 133 F. (2d) 703 (C. C. A. 2); *Micheli v. Paullin*, 45 F. Supp. 687 (D. N. J.); see cases collected in Bullock, *Judicial Review of Selective Service Board Classifications by Habeas Corpus* (1942), 10 Geo. Wash. L. Rev. 827, 829.

Some courts have indicated that review may be had in habeas corpus on the issues whether the boards had jurisdiction and afforded a registrant fair consideration. *Franke v. Murray*, 248 Fed. 865 (C. C. A. 8); *United States v. Heyburn*, 245 Fed. 360 (E. D. Pa.); *United States ex rel. Phillips v. Downer*, 135 F. (2d) 521 (C. C. A. 2); *Benesch v. Underwood*, 132 F. (2d) 430 (C. C. A. 6); *Application of Greenberg*, 39 F. Supp. 13 (D. N. J.); *United States ex rel. Filomio v. Powell*, 38 F. Supp. 183 (D. N. J.); *Micheli v. Paullin*, 45 F. Supp. 687 (D. N. J.); *In re Rogers*, 47 F. Supp. 265 (N. D. Tex.); *United States ex rel. Errichetti v. Baird*, 39 F. Supp. 388 (E. D. N. Y.); *United States ex rel. Cameron v. Embrey*, 46 F. Supp. 916 (D. Md.); cf. *Angelus v. Sullivan*, 246 Fed. 54 (C. C. A. 2); *Bullock, op. cit. supra*. Other courts have indicated that habeas corpus affords protection against a classification based upon a mistake of law. *Ex Parte Beales*,

The consequences of being wrong are more severe under petitioner's position than under that of the Government.—Petitioner's contention that the position of the Government is harsh is misconceived. For, we submit, the consequences to the registrant are less severe if he be required to report, even if he thinks the order is in fact unlawful, and seek relief in habeas corpus. To the registrant it means that if he is unsuccessful in his challenge to his classification he remains a member of the armed forces or a participant in work of national importance under civilian direction. The course which petitioner advocates, on the other hand, involves the hazard of conviction as a felon and the stigma of having evaded the obligation of service in a time of national peril. The comprehensive procedures of the Selective Service System, with provisions for appeal even to the highest executive authority, create the strongest likelihood that the ultimate classification is correct and that it would therefore be a rare case where the registrant could successfully show that his classification is without a basis in

252 Fed. 177 (S. D. Calif.); *United States v. Commanding Officer*, 252 Fed. 314 (D. N. J.); *United States v. Kinkad*, 248 Fed. 141 (D. N. J.), affirmed, 250 Fed. 692 (C. C. A. 3); *Ex parte Platt*, 253 Fed. 413 (E. D. N. Y.); *Stingle's Case*, Fed. Cas. No. 13458 (E. D. Pa.); *Ex parte Green*, 123 F. (2d) 862 (C. C. A. 2), certiorari denied, 316 U. S. 668; cf. *United States ex rel. Cascone v. Smith*, 48 F. Supp. 842 (D. Mass.); *United States ex rel. Phillips v. Downer*, 135 F. (2d) 521, 525 (C. C. A. 2).

evidence. Experience under the Act has proved this to be so. As of September 15, 1943, approximately 105 registrants have sought to be released in habeas corpus after induction on the ground that their classifications were arbitrary. In only three of these cases (*United States ex rel. Phillips v. Downer*, 135 F. (2d) 521 (C. C. A. 2); *Ex parte Stanziale*, 49 F. Supp. 961 (D. N. J.); *Application of Greenberg*, 39 F. Supp. 13 (D. N. J.)) did the courts find that the classifications were not supported by evidence, and in the *Stanziale* case the district court's decision was reversed by the Third Circuit on October 6, 1943.⁴² In addition, in numerous criminal cases the courts, none of which has decided that collateral attack upon a

⁴² In only two additional cases have inducted men been discharged on habeas corpus. *United States ex rel. Bayly v. Reckford*, *United States ex rel. Berans v. Reckford*, heard and decided together by the District Court for the District of Maryland on August 16, 1943. These cases, however, did not involve any issue as to the registrants' classifications, but only a question as to whether they had been called for induction out of the proper order laid down in directions to local boards by the Director of Selective Service.

In addition to the *Stanziale* case, *supra*, reported cases in which registrants have unsuccessfully challenged their classifications in habeas corpus after induction, are: *Benesch v. Underwood*, 132 F. (2d) 430 (C. C. A. 6); *Ex parte Green*, 123 F. (2d) 862 (C. C. A. 2), certiorari denied, 316 U. S. 668; *Micheli v. Paullin*, 45 F. Supp. 687 (D. N. J.); *In re Rogers*, 47 F. Supp. 265 (N. D. Texas); *United States ex rel. Broker v. Baird*, 39 F. Supp. 392 (E. D. N. Y.); *United States ex rel. Cameron v. Embry*, 46 F. Supp. 916 (D. Md.); *United States ex rel. Errichetti v. Baird*, 39 F. Supp. 388 (E. D. N. Y.); *United States ex rel. Filomio v. Powell*, 38

classification in a criminal prosecution is permissible, have found no justification on the merits for judicial intervention.⁴³ This experience shows that the path to judicial review which petitioner insists should be left open to the registrant leads him, however sincere may be his belief that his classification is arbitrary, almost inevitably to the penitentiary.

Remission of the registrant to his remedy by way of habeas corpus after induction, on the other hand, affords him protection against the abuse of power in the administrative process and at the same time effectuates the purpose of the Act expeditiously to raise military forces in sufficient number to meet the exigencies of war. For under this procedure the registrant is not lost to the military forces (which Congress has declared shall be raised, to such extent as may be necessary, in accordance with a fair and just system of selective compulsory training and service) and to that degree the national interest is not prejudiced in the event his complaint is judicially determined to be lacking in merit

F. Supp. 183 (D. N. J.); *United States ex rel. Pasciuto v. Baird*, 39 F. Supp. 411 (E. D. N. Y.); *United States ex rel. Ursitti v. Baird*, 39 F. Supp. 872 (E. D. N. Y.); *United States ex rel. Cascone v. Smith*, 48 F. Supp. 842 (D. Mass.); *Ex parte Robert*, 49 F. Supp. 131 (N. D. Calif.).

⁴³ *United States v. Kauten*, 133 F. (2d) 703, 707 (C. C. A. 2); *Honaker v. United States*, 135 F. (2d) 613 (C. C. A. 4); *Goff v. United States*, 135 F. (2d) 610 (C. C. A. 4); *Barley v. United States*, 134 F. (2d) 998 (C. C. A. 4); *Buttecali v. United States*, 130 F. (2d) 172 (C. C. A. 5); *Rose v. United*

2. THE ORDER TO REPORT IS AN INTERLOCUTORY STEP IN THE SELECTIVE SERVICE PROCEDURE AND THEREFORE IS NOT THE APPROPRIATE POINT FOR AN ATTACK ON THE CLASSIFICATION

The description of the procedure set out above shows that the process of selection and entrance into the armed forces is not complete until induction. *United States v. Kauten*, 133 F. (2d) 703 (C. C. A. 2). Even under the original system of medical examination, when the local board's examiners made a thorough examination, over ten percent of the registrants passed as physically fit by the Selective Service boards were rejected at the induction station.⁴⁴ The procedure was changed early in 1942, so as to provide for only cursory or "screening" examinations by the local boards,⁴⁵ so that at the present time about 40 percent of those reporting for induction are rejected upon physical examination and before actual induction.⁴⁶

Since, therefore, the Army's determination of the registrant's qualifications for service, and the notice of that determination, are indispensable

States, 129 F. (2d) 204 (C. C. A. 6); *Czecinski v. United States* (3 cases), 129 F. (2d) 461 (C. C. A. 6); *United States v. Mroz*, 136 F. (2d) 221, 226-227 (C. C. A. 7); *Seele v. United States*, 133 F. (2d) 1015 (C. C. A. 8); *United States v. Newman*, 44 F. Supp. 817 (E. D. Ill.); *United States v. Kowal*, 45 F. Supp. 301 (D. Del.); *United States v. Pace* (2 cases), 46 F. Supp. 316 (S. D. Tex.).

⁴⁴ *Selective Service in Peacetime*, p. 209.

⁴⁵ See Note, *Classification—Physical Deferments* (1942), 17 Ind. L. J. 308, 312.

⁴⁶ Information compiled from records of Selective Service.

steps prerequisite to induction,⁴⁷ the administrative process is not completed when he is notified to report for induction.⁴⁸ Accordingly any infirmity in his classification does not injure a selectee until he has been accepted for service; an attack on the classification prior thereto is premature. *United States v. Kauten*, *supra*. Like other administrative orders, this order has real import just as does an order of the National Labor Relations Board or the Securities and Exchange Commission setting matters for hearing or investigation, or a subpoena of the Secretary of Labor commanding the production of books and records, or a valuation order of the Interstate Commerce Commission.⁴⁹ But since it is only an interlocutory step in the administrative process it is not yet reviewable. *United States v. Grieme*, 128 F. (2d) 811 (C. C. A. 3); *Fletcher v. United States*, 129 F. (2d)

⁴⁷ War Department Mobilization Regulations 1-7, Par. 13e; (1942) 91 U. of Pa. L. Rev. 366.

⁴⁸ The notice to report itself makes this clear (D. S. S. Form 150): It states that the registrant will proceed to the induction center and "You will there be examined and if accepted for training and service, you will then be inducted into the stated branch of the service. Persons reporting to the induction station in some instances may be rejected for physical or other reasons."

⁴⁹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401; *Mississippi Power & Light Co. v. Federal Power Commission*, 131 F. (2d) 148 (C. C. A. 5); *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501; *United States v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299.

262 (C. C. A. 5); *United States v. Kauten, supra*; cf. *Drumheller v. Berks County Local Board No. 1*, 130 F. (2d) 610 (C. C. A. 3); *United States v. Rauch*, 253 Fed. 814 (S. D. N. Y.). The selectee must await the end of the process and then seek his remedy if he then needs one.

This same factor of lack of finality is present, though to a less degree, in the case of a registrant who, like petitioner, is classified IV-E and ordered to report for work of national importance. For although, as we have seen (*supra*, p. 44), he receives the final type physical examination before being ordered to report, still the possibility remains that he may be rejected for such work upon reporting to the Civilian Public Service Camp. The regulations provide that if his physical condition has changed since his final type examination, the camp physician shall examine him and he may thereupon be rejected, in which event the local board must classify him IV-F (Reg. 653.11). Thus, as of October 15, 1943, of the 8,000 registrants who had reported at such camps, 610, or approximately 7 percent, were rejected.⁵⁰

In the light of the purposes of the Act, the plan adopted by Congress for their effectuation, the practical considerations arising out of the impera-

⁵⁰ Figures compiled from Selective Service records.

tive necessities of war, and the interlocutory nature of an order to report, we urge that, prior to actual induction, registrants must respond to orders directed to them, even if they think them plainly wrong. In view of the availability of habeas corpus as a means of vindicating any constitutional rights, the Court should, we respectfully submit, be reluctant to overturn the carefully devised statutory scheme.

C. Petitioner's offer of proof was insufficient to establish arbitrary or unfair action of the administrative boards

Even if the trial judge had jurisdiction to inquire into the question whether the Selective Service agencies gave petitioner a fair hearing and acted on evidence, petitioner's offer of proof was insufficient to open this question. Petitioner did not offer any evidence tending to show a refusal by the appeal board, by which the ultimate classification was made, to consider his case fairly, nor did he offer in evidence his entire Selective Service file, on which the administrative determination was based.

The attack on the fairness of the boards.—Petitioner's proffered evidence (R. 33) was, in the circumstances of this case, irrelevant and insufficient. The record shows that the ultimate administrative decision in respect of petitioner's classification was made, not by the local board, but

by the *board of appeal*. Upon petitioner's appeal from the local board's I-A classification, the appeal board on January 24, 1942, classified him in Class I-A, "subject to question of conscientious objection" (R. 58). In accordance with the special procedure upon appeal provided by Section 5 (g) of the Act and Regulation 627.25 for registrants who claim exemption as conscientious objectors, the appeal board on the same date referred petitioner's case to the Department of Justice for an advisory recommendation concerning the character and good faith of his objections to participation in war (R. 58).⁵¹ It is evident from this action of the appeal board that it considered and rejected petitioner's claim to exemption as a minister (see Reg. 627.25 (a)). Several months later, on June 17, 1942, the appeal board classified petitioner in Class IV-E (R. 58) as a conscientious objector.

The action of the appeal board in the Selective Service System is as we have shown (*supra*, pp. 39-41) essentially a *de novo* classification. Its classification is final, except where an appeal is taken to the President (Reg. 627.26 (b)). The classification of the appeal board is not a limited review but wholly supersedes the local board's classification. Accordingly, the decision of the local

⁵¹ See *supra*, pp. 40-42, and pp. 71-79 of Brief for the United States in *Bowles v. United States*, 319 U. S. 33, for a description of the procedure on appeal by persons asserting conscientious objections.

board and any irregularity on its part in deciding a registrant's classification is without significance when his case has been decided by the appeal board.

Petitioner did not at the trial attack the procedure of the appeal board or attempt to show that it was prejudiced. His offer of proof in this regard was directed solely to the action of the local board in allegedly denying him a hearing and refusing to listen to documentary evidence concerning his status with the Watchtower Bible and Tract Society. His offer did not specify the precise nature of this evidence and he did not offer to prove that the local board refused to receive it or, what is more important, that it was not before the appeal board. On the contrary, the evidence admitted and offered at the trial indicates that all pertinent evidence relating to petitioner's ministerial status was before both the local board and the appeal board. In his Selective Service questionnaire and conscientious objector's form, petitioner gave the details of his standing with the Society and he attached to the form the Society's certificate that he was an "ordained minister of Jehovah God" (R. 67) and a lengthy statement of his own relating to Jehovah's Witnesses and his position among them and with the Society (R. 69-70). In addition, in his reply of September 8, 1942, to the local board's notice to him of suspected delinquency in failing to present himself for work

of national importance (R. 61), following his final classification by the appeal board in class IV-E, petitioner requested the local board to reconsider his case "and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV-E" (R. 62).⁵²

Furthermore, even if the local board did refuse to receive material evidence, its action would not have foreclosed petitioner from presenting such evidence to the appeal board, for Regulation 627.12 provides that on his appeal the registrant "may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and *may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.*" [Italics supplied.] Thus it will be seen that an administrative remedy is expressly provided to protect against occurrences such as petitioner alleges. Petitioner did not

⁵² It should be noted that the affidavits of other persons which petitioner sought to introduce at the trial are dated in May 1942 (R. 73-76), at the time his case was before the Department of Justice (see R. 58). They are marked as exhibits by the Hearing Officer of the Department and apparently were obtained for his consideration.

offer to prove that, assuming he was prevented from presenting evidence to the local board, he could not or did not take advantage of the remedy provided in Regulation 627.12. And, indeed, as we have noted, the record indicates that the material sought to be shown to the local board was considered by the appeal board.

In these circumstances, it is submitted that, even if procedural irregularities or prejudice are proper defenses to a criminal proceeding, the trial court's ruling excluding the proffered evidence was correct. There was no attempt to show that the appeal board acted arbitrarily or that in consequence of the local board's allegedly arbitrary action the appeal board did not have before it all pertinent evidence which petitioner had to offer. Hence, petitioner's offer of proof was insufficient to raise any question concerning the procedural fairness or impartiality of the effective administrative decision. Cf. *Bowles v. United States*, 319 U. S. 33, 35-36.

The attack on the sufficiency of the evidence.—Nor was petitioner's offer of proof sufficient to test whether the administrative boards acted upon evidence. As the appeal board made the ultimate classification and rejected petitioner's claim that he was a minister, presumably petitioner would have made an adequate offer of proof had he offered to prove that the appeal board did not act upon evidence. But he made no such offer.

Under the Regulations, petitioner was entitled to inspect his entire file. *Bowles v. United States*, *supra*, at p. 34. He was not denied this opportunity and, indeed, he was permitted to withdraw from the file and offer in evidence so much of it as he wished (R. 10, 15, 18, 20, 26, 61-77). But instead of offering the entire file in evidence, petitioner selected portions of it, presumably those favorable to himself, and offered them in evidence (R. 20, 61-77). This was manifestly insufficient to raise the issue. See *Miss. Valley Barge Co. v. United States*, 292 U. S. 282, 286; *Louisiana & P. B. Ry. Co. v. United States*, 257 U. S. 114, 116. Cf. *Tagg Bros. v. United States*, 280 U. S. 420, 443-444.

The reason for petitioner's failure to offer the entire file is apparent from the record. At the trial petitioner's theory of the case was that a *de novo* consideration of his classification by either the judge or the jury was required. The alleged arbitrariness of the local board was offered to dispel any weight that board's determination might have, but this was intended for the *de novo* hearing and not as an independent ground.

The plea in abatement.—Finally, the plea in abatement (R. 3-5) did not raise the issue, because it contained the same infirmities that appear in the offer of proof. Its first ground was that petitioner is a minister and the local board knew it (R. 3.) This contemplates a *de novo* judicial hearing, and more-

over refers only to the local board, not the appeal board. The second ground attacks the procedure of the local board and says nothing of the appeal board (R. 3-4). On its face the plea in abatement is without merit because when construed most favorably to petitioner it would assert that the local board, not the appeal board, made the classification sought to be questioned; but if this were so, petitioner would have failed to exhaust his administrative remedies and thus would be unable to seek any judicial relief from the classification. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51. And as the plea in abatement is silent regarding the action of the appeal board it cannot reasonably be construed as challenging the action of the appeal board as being without supporting evidence or based on a refusal to consider the matter fairly.

It is evident that petitioner was not concerned at the trial, and is not primarily concerned now, with obtaining a review by the trial judge of the Selective Service file to determine if the Selective Service agencies acted fairly and upon evidence. Petitioner has sought a *de novo* determination of his classification. As a consequence of the approach which his case has followed, the record would not put petitioner in a position to benefit even if the trial judge in the criminal proceeding did have jurisdiction to determine if the administrative boards acted fairly and upon evidence.

D. Petitioner's charge that the Selective Service System has discriminated against Jehovah's Witnesses is unfounded

Petitioner implies in his brief (see pp. 68-71, 74-85) that in respect of pioneers, at least, Jehovah's Witnesses have been discriminated against in the administration of the Act. Although his argument in this regard is not directly relevant to the legal issues presented, we feel compelled in these circumstances to set forth briefly the beliefs of Jehovah's Witnesses in respect of their rights and duties under the Act, the status of pioneers in relation to the general body of Witnesses, and the history of the efforts made by Selective Service, in attempted cooperation with the leaders of the movement, to accommodate the standards laid down in the Act to the beliefs and practices of the organization with a view to establishing workable principles for the guidance of the agencies of Selective Service. A statement of these matters will demonstrate that Selective Service has been solicitous in its efforts to secure to these registrants full protection of all the rights to which they are entitled and, indeed, that in recognizing the claims of the Watchtower Bible and Tract Society in respect of the ministerial status of certain individuals and groups within the organization, National Headquarters of Selective Service has been, if anything, overgenerous.

As early as October 4, 1940, less than three weeks after the enactment of the Selective Train-

ing and Service Act,⁵³ the Department of Justice, charged under the Act with duties regarding conscientious objectors, requested Mr. Hayden C. Covington, legal counsel of Jehovah's Witnesses, to furnish information regarding the Witnesses and their relationship to the draft. In response to this request Mr. Covington, in a letter to Mr. L. M. C. Smith, then Special Assistant to the Attorney General, dated October 9, 1940, submitted information which he said he had "obtained from the official publishers for Jehovah's Witnesses."⁵⁴ The letter stated that the Watchtower Bible and Tract Society, Inc., a New York corporation, and two other corporations⁵⁵ organized for the same purposes and having the same officers, are the "publishers for Jehovah's witnesses" which "print and manufacture literature used by" the Witnesses. Jehovah's Witnesses, as such, it was said, are not a corporation, but "are collectively the body of the organization formed by the Almighty God and over which Christ Jesus is the

⁵³ The Act was approved September 16, 1940 (54 Stat. 885).

⁵⁴ Mr. Covington's letter was published in the October 30, 1940, issue of "Consolation" (Vol. XXII, No. 551, pp. 24-30), the Watchtower Bible and Tract Society's biweekly magazine. A copy of this issue is contained in petitioner's Selective Service file, and although it is detached, petitioner apparently submitted it to the local board along with his conscientious objector's form (see R. 63, 65).

⁵⁵ Watchtower Bible and Tract Society, a Pennsylvania corporation organized in 1884, and International Bible Students Association, incorporated in 1914 under the laws of Great Britain.

appointed Head and Chief." All persons who enter into a covenant "to do the will of Almighty God, and hence to follow in the footsteps of Christ Jesus," are witnesses for Jehovah, commissioned to transmit His message and to bear testimony before the people that His purpose is to establish the Theocracy. "the government of the world under the command of Jehovah God by and under the immediate direction of Christ Jesus the King." The identity and number of all such persons is unknown to man, and the Society does not keep a list of Witnesses because "no man or organization has authority to keep a roll showing who are or who are not Jehovah's Witnesses." The letter stated, however, that the Society and its affiliated corporations "have placed in the hands of the peoples of earth more than three hundred million volumes of books, published in eighty or more languages," thus implying that the number of Witnesses is great. The attitude of Jehovah's Witnesses toward war was said to be one of absolute neutrality; for the nations of the earth "are against God and His Kingdom"—the Theocracy—and therefore it was said that Jehovah's Witnesses are forbidden by God's will to engage in war between nations. It is for each Witness to determine for himself, however, whether he will claim conscientious objections to military service, since each must determine whether he is wholly devoted to God and His Kingdom. In respect of the standing of Wit-

nesses as ministers, it was said that all sincere persons who are devoted to Jehovah and have made a covenant to do His will and have been accepted by Him as such servants are possessed of scriptural ordination as "ministers or Witnesses of Almighty God." Each such person is recognized by the Society and the body of Witnesses to be an "ordained minister of God and Christ" with authority to represent the Society "as a minister and as a witness for Jehovah"; and he is given an identification card showing that he is "an ordained minister of the gospel."⁵⁶ This procedure, it was said, constitutes the "human ordination" of such person. The letter stated in conclusion that the Society has for more than 50 years maintained schools "for the instruction of students in the Divine Word" and that, in addition, companies or branch schools are maintained where each week any person who desires it may receive free instruction under the direction of "competent instructors, elders and ministers and servants."

In June 1941, following discussions between representatives of the Society and National Headquarters of Selective Service, the Society, at the request of General Hershey, submitted to National Headquarters a list of members of the Bethel family of Jehovah's Witnesses located at the Brooklyn offices of the Society and of pioneers who devoted substantially full time to the work

⁵⁶ See R. 67.

of Jehovah's Witnesses.⁵⁷ On June 12, 1941, National Headquarters issued Opinion No. 14 (Petitioner's Appendix, pp. 36-39) concerning the ministerial status of Jehovah's Witnesses. This opinion stated that the Witnesses were considered to constitute a recognized religious sect and that certain members of the group, "by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work" are placed "in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers of other religions." Members of the organization at the Brooklyn factory and offices and at various farms who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of the Witnesses (the Bethel family), were considered as having a standing in relation to the general body which brought them within the purview of the ministerial exemption of the Act (Sec. 5 (d)) and the opinion stated that such persons "may" be classified in IV-D, provided their names appeared on the "certified official list" transmitted to State Directors. In addition, members

⁵⁷ A copy of General Hershey's letter of June 10, 1941, to Mr. Covington requesting such lists was published in *Consolation* for July 9, 1941 (Vol. XXII, No. 569, p. 22).

who devoted all or a substantial part of their time to teaching the tenets of their religion and in converting others to their beliefs and who were recorded as pioneers by the Society, were considered as qualifying for the exemption if their names appeared on the official list. Other persons known as regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants were not listed and the opinion stated that their status as ministers within the meaning of the Act must be determined on an individual basis.

Following this, on June 25, 1941, National Headquarters transmitted to the State Directors of Selective Service the official list of members of the Bethel family and pioneers which had been furnished by the Society; the list contained the names of 951 men 36 years of age and under.⁶⁸

Soon after the publication of the official list the Society began to make applications to National Headquarters to have the names of other registrants added to it. Between June 25, 1941, and January 16, 1942, 25 such applications were granted, while applications on behalf of 30 other

⁶⁸ At that time the age limits for military training and service were 21 to 36 (see footnote 23, *supra*, p. 35). The list was published in *Consolation* for July 9, 1941 (Vol. XXII, No. 569, pp. 26-27), along with Opinion No. 14 (pp. 23-25). A copy of this issue is contained in petitioner's Selective Service file. His name did not appear on the list. We have lodged a copy of the list with the Clerk.

individuals were denied, principally because the registrants involved were delinquent or had already been classified IV-D by their local boards. During the fall of 1941 and the first few months of 1942 efforts were made to reach an understanding with representatives of the Society concerning the number of pioneers who might appropriately be added to the list. In the course of these negotiations Mr. Covington advised National Headquarters by a letter dated January 27, 1942, that "no specified educational background is required of any individual precedent to admission to the pioneer ranks" and that "no specified time is required in study and preparation because of the varying ability of the different ones."⁵⁹ On March 30, 1942, however, Mr. Covington agreed to restrict future applications to those who had "a minimum of one year's active association with Jehovah's Witnesses, as well as a year or more continuous study of the Watch Tower publications."⁶⁰

In the meantime, on January 8, 1942, the names of a number of registrants were removed from the official list upon the basis of information furnished by the Society. On February 20, 1942, National Headquarters transmitted to the State Directors a revised official list of pioneers and

⁵⁹ Compare p. 79 of petitioner's brief, and pp. 75-77, *infra*.

⁶⁰ Mr. Covington's letter of January 27, 1942, is copied in Appendix C, *infra*, pp. 122-125.

Bethel family members. This list contained the names of 790 men.⁶¹

At about the same time, National Headquarters instituted the practice of investigating through the local boards each new application submitted by the Society for addition to the official list and this practice was followed until the fall of 1942, when the volume of applications became so great that it was impossible to pass upon each one individually (see pp. 75-77, *infra*).⁶² As a result of this, National Headquarters, after a conference with Mr. Covington, decided to discontinue the practice of adding names to the list. Accordingly, on October 29, 1942, the State Directors were advised that registrants whose names appeared on the list would remain in the status previously enunciated

⁶¹ A copy of this list has been left with the Clerk. Petitioner's name did not appear on this list. At that date his case was pending before the board of appeal (see R. 58). His Selective Service file contains a letter from the State Director to the chairman of the local board, dated May 18, 1942, which was two months prior to his classification in IV-E by the board of appeal, stating that National Headquarters had denied the Society's application to have petitioner's name added to the official list. The State Director added, however, that the fact that a registrant's name was not on the list was not conclusive and that his classification should be determined upon the facts of his case.

⁶² It had previously been estimated, on the basis of information furnished by the Society as to the increase in the number of pioneers enrolled during the period 1935-1940, that an increase of from 50 to 80 new pioneers per year would not be disproportionate with the growth shown during that period. The number of applications submitted by the Society greatly exceeded National Headquarters' estimates.

but that no further additions would be made to the list. On December 17, 1942, National Headquarters forwarded to the State Directors a final and consolidated list of members of the Bethel family and pioneers. This list contained the names of 1,026 men.⁶³ In the meantime, on November 2, 1942, Opinion No. 14 of National Headquarters (see pp. 68-69, *supra*) was amended to eliminate the proviso that members of the Bethel family and pioneers might be classified IV-D, as ministers, if their names appeared on the official list. Reference was made in the amended opinion to the list and it was stated that registrants whose names appeared thereon "may" be classified IV-D, but in respect of members of the Bethel family and pioneers not on the list, their status, like that of members of Jehovah's Witnesses functioning in various other capacities, was to be determined on the facts of each case.⁶⁴

When viewed against the background of the religious activities of Jehovah's Witnesses we think that the interpretation of the ministerial exemption as not precluding the exemption of any pioneers is a liberal one. All Jehovah's Witnesses affiliated with the Society are referred to in its literature as "publishers."⁶⁵ These

⁶³ We have also lodged a copy of this list with the Clerk.

⁶⁴ Opinion No. 14, as so amended, is also printed in the appendix to Petitioner's Brief, pp. 40-43.

⁶⁵ See, e. g., 1943 Yearbook of Jehovah's Witnesses, pp. 38-39.

persons are engaged in "witnessing" and the dissemination of religious literature published by the Society.⁶⁶ As we understand the organization of the Witnesses a pioneer differs from the rank and file Witnesses in that he must devote at least 150 hours per month to such work (see R. 36, 1942 Yearbook, p. 42). He enjoys special price concessions on literature published by the Society in order that he may earn enough to defray his expenses (see R. 36-37).⁶⁷

Indeed, up to the year 1931, pioneers were called *colporteurs* (1932 Yearbook, p. 48; compare 1931 Yearbook, p. 66). The 1932 Yearbook explained the change in name on the ground that the definition of "*colporteur*"—one who travels about distributing or selling religious literature—did "not exactly fit 'Jehovah's witnesses,'" because they "are not engaged in a selling enterprise, nor are they merely distributing literature, but they are bearing testimony to the people in obedience to God's commandment" (p. 48). The same Yearbook described the relationship of pioneers to other Witnesses in terms of the amount of time devoted to field work. Pioneers, it stated, are those who devote full time to such work. "Next to them are the 'auxiliary' workers, who devote

⁶⁶ See *id.*, pp. 23, 27-29, 38-40; 1940 Yearbook, pp. 37-39; 1931 Yearbook, p. 66.

⁶⁷ The 1931 Yearbook stated (pp. 67-68) that the average "margin" of "pioneer *colporteurs*" dropped from \$0.46 per hour in 1929 to \$0.319 in 1930.

a part of their time to the field work; and then there are those who are members of a company in a community and who devote their evenings, Saturday afternoons and Sundays to the field service. It is all one company of 'Jehovah's witnesses,' but they are thus designated to distinguish the amount of time employed in the work" (pp. 48-49).

Although, as we have seen (*supra* p. 67), all Jehovah's Witnesses are deemed to be ministers, the Watchtower Bible and Tract Society has in the Yearbooks designated and recognized a limited number of specially qualified members as ordained ministers authorized to represent the Society. Each Yearbook for the period 1932-1943 has carried the names of such ministers.⁶⁸

⁶⁸ Thus, the 1932 Yearbook stated, under the heading "Ordained Representatives" (p. 30):

"Ordination to preach the gospel of God's kingdom proceeds from Jehovah, and not from man; but it is strictly within the authority of the Society to select certain men and send them out to represent the Society in preaching the gospel in a more public way. Amongst those thus ordained by the Lord, and who were selected by the Society as its representatives and thereby ordained by the Society, the following are named:"

There followed a list of 243 such selected representatives.

The 1933 Yearbook described these representatives in the following language (p. 16):

"The Society, acting in harmony with the expressed word of the Lord, designates certain ones who appear to have reached maturity in Christ, and are therefore elders according to the Scriptures, as ministers ordained and sent forth to perform certain duties amongst the anointed and for the

While thus naming individually each such authorized minister, the Society in its Yearbooks merely refers to the number of pioneers engaged in field work each year. For the years 1932-1939 there was an over-all increase in the number of pioneers from 1,997 to 2,176.⁶⁹ By the end of 1940, however, the number of pioneers had increased to 3,879 (1941 Yearbook, p. 74). At the end of 1941 there were 5,463 pioneers. This unprecedented increase was described in the 1942 Yearbook as follows (p. 46):

people who desire to hear the truth. Among those who are thus ordained and sent forth are the following:"

This was followed by the names of 234 persons.

The Yearbooks for the ensuing years contain similar lists, as follows:

1934 Yearbook—225 persons (pp. 51-53).

1935 Yearbook—222 persons (pp. 49-51).

1936 Yearbook—231 persons (pp. 60-62).

1937 Yearbook—231 persons (pp. 73-74).

1938 Yearbook—240 persons (pp. 62-63).

1939 Yearbook—405 persons (pp. 77-79).

1940 Yearbook—426 persons (pp. 72-74).

1941 Yearbook—461 persons (pp. 60-62).

1942 Yearbook—438 persons (pp. 31-34).

1943 Yearbook—486 persons (pp. 18-22).

Petitioner's name appears nowhere in these lists carried in the Yearbooks.

⁶⁹ The number of pioneers in each of those years, as given in the Yearbooks, was as follows:

1932—1,997 (1933 Yearbook, p. 50).

1933—1,976 (1934 Yearbook, p. 43).

1934—1,976 (1935 Yearbook, p. 41).

1935—1,829 (1936 Yearbook, p. 53).

1936—1,831 (1937 Yearbook, p. 65).

1937—number not given.

Pioneers.—During the year a series of special letters were sent out to all companies, calling attention of the brethren to the wonderful privileges of service set before them in the full-time work. The response to the call to pioneer service was excellent. The campaign started in March, and month by month the ranks of the pioneers grew. The first month it increased by 103 pioneers; April, 127; May, 302; June, 307; and July, 464. In August almost everybody went to the convention, but there applications were filed for pioneer service by over 700. By the end of the year a grand total of 2,093 new pioneers had been enrolled. In closing the records of the Society at the end of the year it was found there are 5,463 actually enrolled in full-time service. This is the greatest number ever engaged in this field in the United States.

In the year 1942, 1,500 pioneers were designated as special pioneers, but there was also an average monthly increase of 421 in the number of pioneers (1943 Yearbook, p. 44), representing a total in-

1938—1,910, including 247 special pioneers* (1939 Yearbook, pp. 59, 69).

—1939—2,176, including 256 special pioneers (1940 Yearbook, pp. 56, 67).

*The special pioneer group was established in 1937 to do "witness work" by means of phonographs and records (see 1938 Yearbook, pp. 51-52). At the present time, however, it appears that the qualification for a special pioneer is that he work 175 hours per month (see R. 35, 1943 Yearbook, p. 42).

crease during 1942 alone of 5,052 in the number of pioneers, an increase of nearly 100%. The 1943 Yearbook stated that at the convention held in September 1942 "The call went forth for 10,000 pioneers in the United States by next April; and, from the way the brethren have applied for pioneer service since this convention, it appears very likely that we shall have the 10,000 in the United States. Within four weeks after the convention ended 600 new applications for pioneer service had been received at the office" (p. 67).⁷⁰

In the light of these facts we think it is evident that Selective Service has been scrupulously fair as regards Jehovah's Witnesses.⁷¹ The task of

⁷⁰ This abnormal growth in the number of pioneers enrolled in the years 1940, 1941, and 1942 should be compared with the significant facts and dates in petitioner's case. He claimed to have been ordained in 1930, when he was 15 years old (R. 34, 56). From 1937 to 1939 he worked as a clothing salesman (R. 54). He became a pioneer on September 1, 1940 (R. 23, 36), approximately two weeks before the Act was approved, and a special pioneer on April 16, 1942 (R. 37), while his case was pending before the board of appeal (R. 58).

⁷¹ In England Jehovah's Witnesses are not regarded as constituting a denomination within the meaning of the National Service (Armed Forces) Act, 1939, 2^d and 3^d Geo. VI, Ch. 81, which exempts from military service "regular minister(s) of any religious denomination" (Section 11), and, moreover, individual members of the cult are not considered to be regular ministers. We have copied in Appendix C, *infra*, pp. 118-121, a letter from Mr. G. Myrddin-Evans, an Undersecretary of the Ministry of Labour and National Service and the Assistant to the Director of Manpower, to the late Colonel Roy Dickinson, who was an as-

administration of the Act in relation to these registrants is, concededly, a difficult one. As stated in the Second Report of the Director of Selective Service "The attitude of the cult was plain. It wanted absolutely no part in the war—it claimed that under its doctrine and practice each and every member of the cult was a 'regular or duly ordained minister of religion'" (*Selective Service in Wartime*, p. 322).

CONCLUSION

For the foregoing reasons, we submit the decision below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
VALENTINE BROOKES,
Special Assistants to the Attorney General.

NOVEMBER 1943.

sistant executive in the office of the Director of Selective Service, which explains the status of Jehovah's Witnesses under the English act.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Appendix 301-318) provides, in part, as follows:

SEC. 5. * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * * * *

(g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to

work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service be-

cause of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10 (a). The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein au-

thorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

* * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or

regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

* * * * *

APPENDIX B

SELECTIVE SERVICE REGULATIONS

621.1 *Mailing questionnaires.*—(a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.

* * * * *

621.3 *Special form for conscientious objector.*—A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objector (Form 47) which, when filed, shall become a part of his Selective Service Questionnaire (Form 40). The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (Form 47).

621.4 *Claims for, or information relating to, deferment.*—(a) The registrant shall be entitled to present all written information which he believes to be necessary to assist the local board in determining his proper classification. Such information should be included in or attached to the Selective Service Questionnaire (Form 40) and may include any documents, affidavits, or deposi-

tions. The affidavits and depositions shall be as concise and brief as possible.

* * * * *

622.11 *Class I-A: Available for military service.*—In Class I-A shall be placed every registrant who, upon classification, has not been placed in Class I-C, Class IV-E, Class I-A-O, or in a deferred class.

622.12 *Class I-A-O: Available for noncombatant military service; conscientious objector.*—In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to combatant military service in which he might be ordered to take human life, but not conscientiously opposed to noncombatant military service in which he could contribute to the health, comfort, and preservation of others.

* * * * *

622.44 *Class IV-D: Minister of religion or divinity student.*—(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a

member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

* * * * *

622.51 *Class IV-E: Available for work of national importance; conscientious objector.*—(a) In Class IV-E shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

(b) Upon being advised by the Director of Selective Service that a registrant who was inducted into the land or naval forces for military service will be discharged because of conscientious objections which make him unadaptable to military service, the local board shall change such registrant's classification and place him in Class IV-E. The Director of Selective Service shall assign such registrant to work of national importance under civilian direction.

* * * * *

623.1 *General principles of classification.*—(a) Each registrant shall be classified as soon as practicable after his Selective Service Questionnaire (Form 40) is received by the local board. * * *

(b) It is the local board's responsibility to decide in the first instance the class in which each registrant shall be placed.

(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

623.2 *Information considered for classification.*—The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file; * * *. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.

* * * * *

623.21 *Consideration of classes not requiring physical examination.*—(a) Upon undertaking to classify any registrant, it should first be determined whether he should be classified in Class I-C. If the registrant is not classified in Class I-C, it should next be determined whether he should be classified in Class IV-A.

(b) If the registrant is not classified in Class I-C or class IV-A under paragraph (a) of this

section, the local board shall next determine whether he should be classified in Class IV-C on the ground that he is a neutral alien who has filed DSS Form 301 or on the ground that there is no possibility of his being accepted for training and service because of his nationality or ancestry. Otherwise no consideration will be given to Class IV-C at this time.

(c) If the registrant is not classified in Class I-C or Class IV-A under paragraph (a) of this section and is not classified in Class IV-C under paragraph (b) of this section, consideration shall next be given to the following classes in the order listed, and the registrant shall be classified in the first class for which grounds are established:

Class IV-D.

Class IV-B.

Class III-C.

Class III-A.

Class II-C.

Class II-B.

Class II-A.

(d) If the registrant is not classified in one of the classes set forth in paragraph (a), (b), or (c) of this section, and, under the provisions of section 622.61, he is completely disqualified morally and there is no possibility that a waiver of such moral disqualification can be secured, he shall be classified in Class IV-F (moral). Otherwise no consideration will be given to Class IV-F at this time.

(e) If the registrant is not classified in one of the classes set forth in paragraphs (a), (b), (c), or (d) of this section, consideration shall next be

given to whether he qualifies for classification in Class III-D.

* * * *

623.31 *Notice to registrant to appear for physical examination.*—(a) If a registrant has not been placed in one of the classes set forth in section 623.21 the local board, as soon as practicable after the determination of that fact, shall mail to him a Notice to Registrant to Appear for Physical Examination (Form 201). This notice shall fix the date, time, and place for the registrant to report for such physical examination, normally 5 days after the date of mailing of such notice.

(b) On the day and at the time and place fixed in the Notice to Registrant to Appear for Physical Examination (Form 201), the registrant shall appear before the examining physician and submit to physical examination.

* * * *

623.33 *Physical examination by examining physician.*—(a) The Director of Selective Service, from time to time, will issue a List of Defects (Form 220), which will set forth defects which manifestly disqualify the registrant for military service.

(b) A registrant shall personally appear before the examining physician and shall be examined in the manner provided in paragraph (c) of this section except when the examining physician or the local board is convinced that the appearance of the registrant for physical examination before the examining physician will be injurious to the registrant's health or the health of those who might be brought in contact with him. When the

registrant appears before the examining physician, his physical examination should be held in a well-lighted, well-heated place. It should be held while the registrant is in the nude.

(c) The physical examination should consist of observing the registrant while walking toward, standing before, and walking away from the examining physician. The registrant may be required to go through calisthenics to determine the mobility of joints or to furnish a basis for determination of his alertness, intelligence, understanding of commands, postural tensions, tendencies to incoordination, and tremors. If peculiarities are noted, simple questions should be asked in an effort to bring out replies bearing on the mental health and personality characteristics of the registrant. The examining dentist, or if he is not available, the examining physician, will examine the mouth of the registrant. The examining physician will take blood from the registrant for a serological test. The blood specimen will be collected in a container furnished by the State health officer and will be forwarded to the State laboratory or other laboratory designated by the State Director of Selective Service, together with the accomplished form prescribed within the State for such purpose. If the report on the first serological test of the registrant is other than truly negative, the examining physician shall take additional blood for further serological tests until he is satisfied that the blood is truly negative, truly doubtful, or truly positive. Additional blood for further serological tests will not be taken if distance or circumstances over which the local board or the registrant has no control make it imprac-

licable for additional tests to be taken. Serological tests will be accomplished without expense to the Selective Service System, unless such expense is specifically authorized by the Director of Selective Service. No other laboratory procedures will be undertaken as a part of this physical examination.

(g) The examining physician shall enter in Item 24 on the Report of Physical Examination and Induction (Form 221) the result of the serological tests as "Truly Negative," "Truly Doubtful," or "Truly Positive."

(h) The examining physician will enter in Item 25 on the Report of Physical Examination and Induction (Form 221) any pertinent remarks which he deems advisable for the benefit of the examiners at the induction station.

(i) The examining physician, in Item 26 on the Report of Physical Examination and Induction (Form 221), shall complete the answer to the following question:

Do you find that the above-named registrant has any of the defects set forth in the List of Defects (Form 220)?

If the examining physician's answer is "Yes," he shall describe the defects in order of their significance. If the examining physician entertains a doubt as to whether he should answer "Yes" or "No," his answer shall be "No." No other information should be included under Item 26.

623.51 *Procedure for classification after physical examination.*—(a) After physical examination, the report of the examining physician shall be

considered, and the registrant shall be classified in the manner hereinafter provided.

(b) If the registrant is found to have a defect set forth in the List of Defects (Form 220) as manifestly disqualifying him for military service, he shall be classified in Class IV-F.

(c) If the registrant has made a claim that he is a conscientious objector and if such registrant has not been classified in Class IV-F as provided in (b) above, it shall be determined whether such registrant, by reason of religious training and belief, is conscientiously opposed to participation in war in any form, and, if he is, whether he is conscientiously opposed to both combatant and noncombatant military service or is opposed to combatant military service only. When this determination has been made, classification will continue in the manner hereinafter provided.

(d) Deleted.

(e) If the registrant has not been classified in Class IV-F in the manner provided in paragraph (b) of this section, he shall be classified in Class I-A; provided that: (1) If such registrant has been found to be a conscientious objector to combatant military service but not a conscientious objector to noncombatant military service, he shall be classified in Class I-A-O; or (2) if such registrant has been found to be a conscientious objector to both combatant and noncombatant military service, he shall be classified in Class IV-E.

* * * * *

625.1 *Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance

before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

* * * * *

625.2 *Appearance before local board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining

his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that, if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

626.1 *Classification not permanent.*—(a) No classification is permanent.

(b) Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

626.2 *When registrant's classification may be reopened and considered anew.*—(a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an

Order to Report for Induction (Form 150) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service.

* * * *

627.1 *Who may appeal any determination of a local board to a board of appeal at any time.*—(a) Either the State Director of Selective Service or the Director of Selective Service may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.

627.2 *Who may appeal registrant's classification to board of appeal under certain circumstances.*—(a) The registrant, any person who claims to be a dependent of a registrant, any person who has filed written evidence of the occupational necessity of a registrant, or the government appeal agent may appeal to a board of appeal from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board.

(b) The government appeal agent may take any appeal authorized under paragraph (a) of this section at any time within 10 days after the date

when the local board mails to the registrant a Notice of Classification (Form 57) or at any time before the registrant is mailed an Order to Report for Induction (Form 150).

(c) The registrant, any person who claims to be a dependent of the registrant, or any person who has filed written evidence of the occupational necessity of the registrant may take an appeal authorized under (a) above at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57). At any time prior to the date that the local board mails to the registrant an Order to Report for Induction (Form 150), the local board may permit any such person to appeal, even though such 10-day period has elapsed, if it is satisfied that the failure of such person to appeal within the 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the 10-day period. If such an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Selective Service Questionnaire (Form 40) under the heading "Minutes of Other Actions."

* * * * *

627.11 *How appeal to board of appeal is taken.*—(a) Any person entitled to do so may appeal in either of the following ways:

(1) By filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name

and identity of the person appealing so as to show the right of appeal.

(2) By signing the "Appeal to Board of Appeal" on the Selective Service Questionnaire (Form 40).

* * * * *

627.12 *Statement of person appealing.*—The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13 *Local board to transmit record to the board of appeal.*—(a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.

(b) Immediately upon determining that all steps required by the regulations have been taken and that the record is complete, the local board

shall transmit the file to the board of appeal, provided that the State Director of Selective Service may direct the channels through which such file shall be forwarded to the board of appeal.

* * * * *

627.23 *Preliminary review.*—The board of appeal will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the board of appeal to determine the classification of the registrant, the board of appeal shall return the file to the local board with proper instructions. If the board of appeal returns the file to the local board, it shall enter the date of the return in column 4 of the Docket Book of Board of Appeal (Form 102).

627.24 *Review by board of appeal.*—(a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, no information shall be considered which is not contained in the record received from the local board and the decision of the board of appeal shall be based solely thereon.

627.25 *Special provisions where appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal shall first determine whether the registrant should be classified in one

of the classes set forth in section 623.21, in the order set forth, and if it so determines, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the United States district attorney for the judicial district in which the local board of the registrant is located for the purpose of securing an advisory recommendation of the Department of Justice, provided that in a case in which the local board has classified the registrant in Class IV-E or in a case in which the registrant has claimed objection to combatant service only and the local board has classified him in Class I-A-O, the board of appeal may affirm the classification of the local board without referring the case to the Department of Justice. No registrant's file shall be forwarded to the United States district attorney by any board of appeal and any file so forwarded shall be returned, unless in the "Minutes of Other Actions" on the Selective Service Questionnaire (Form 40) the record shows and the letter of transmittal states that the board of appeal reviewed the file and determined that the registrant should not be classified in one of the classes set forth in section 623.21.

(b) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal (1) that, if the regis-

trant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such non-combatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the board of appeal shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice.

627.26 *Decision of board of appeal.*—(a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant. (See part 623.)

(b) [Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

627.27 *Record of decision on appeal.*—When the board of appeal makes its classification, it shall record its decision, showing the yes and no vote, upon the Selective Service Questionnaire (Form 40) and in the Docket Book of Board of Appeal (Form 102), shall mark the case "Closed" in the "Remarks" column of the Docket Book of Board of Appeal (Form 102), and shall imme-

diately return the record to the local board, provided that the State Director of Selective Service may direct the channels through which the record shall be returned to the local board.

* * * *

627.41 *Appeal stays induction.*—A registrant shall not be inducted either during the period afforded him to take an appeal to the board of appeal or during the time such an appeal is pending.

* * * *

627.61 *Reconsideration of board of appeal determination.*—(a) When either the Director of Selective Service or the State Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may, at any time, request a board of appeal to reconsider any determination made by it, stating his reasons for requesting such reconsideration. Upon receiving such a request, a board of appeal will reconsider its determination in any case.

(b) At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57), as provided in section 627.31; or at any time before the registrant is mailed an Order to Report for Induction (Form 150), the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the board of appeal to reconsider its determination or appeal to the President. The registrant's file shall then be forwarded to the State Director of Selective Service. As soon as the State Director of Selective Service has acted

upon the government appeal agent's request he shall advise the local board and, if he determines neither to request the board of appeal to reconsider its determination nor to appeal to the President, he shall return the file to the local board.

* * * *

628.1 *Who may appeal to the President from any determination of a board of appeal.*—(a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

(b) An appeal to the President may be taken by the Director of Selective Service (1) by mailing to the local board, through the State Director of Selective Service, a written notice of appeal or (2) by placing in the registrant's file a written notice of appeal and, through the State Director of Selective Service, advising the local board thereof.

(c) An appeal to the President may be taken by the State Director of Selective Service (1) by mailing to the local board a written notice of appeal and directing the local board to forward the registrant's file to him for transmittal to the Director of Selective Service or (2) by placing in the registrant's file a written notice of appeal and advising the local board thereof. Before he forwards the registrant's file to the Director of Selective Service, the State Director of Selective Service shall place in such file a written statement of his reasons for taking such appeal.

* * * *

628.2 *Appeal to the President.*—The registrant or any person who claims to be a dependent of the registrant or any person who has filed written information as to the occupational status of the registrant, at any time within 10 days after the mailing by the local board of the Notice of Classification (Form 57), notifying the registrant that the local board classification has been affirmed or changed, may appeal to the President provided the registrant was classified by the board of appeal in either Class I-A, Class I-A-O, or Class IV-E and one or more members of the board of appeal dissented from such classification. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 10-day period herein provided for such an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board permits such an appeal, the right of such persons to appeal to the President shall terminate at the end of the 10-day period herein provided.

* * * * *

628.7 *Appeal to the President stays induction.*—(a) When a registrant is classified by the board of appeal and one or more members of the board of appeal dissent from such classification, the registrant shall not be inducted during the period afforded him to take an appeal to the President.

(b) A registrant shall not be inducted during the time an appeal to the President is pending.

* * * * *

633.1 *Order to report for induction (Form 150).*—(a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in duplicate. The local board shall mail the original to the registrant and shall file the copy in his Cover Sheet (Form 53).

* * * * *

633.9 *Induction.*—At the induction station, the selected men found acceptable will be inducted into the land or naval forces.

* * * * *

633.13 *Classification when man is inducted.*—Upon receiving notice from the induction station that a selected man has been inducted, he shall be placed in Class I-C.

* * * * *

633.13-2 *Classification of man not accepted.*—(a) Upon receiving notice from the induction station that a selected man has not been accepted because he is disqualified for service in the land or naval forces, the local board shall reopen his classification and classify him in Class IV-F unless he is a man who was honorably discharged from the land or naval forces based on physical or mental disability, in which case the local board shall classify him in Class I-C.

* * * * *

651.1 *Selection of registrants for assignment to work of national importance.*—Every registrant

who is classified in Class IV-E, before he is assigned to work of national importance under civilian direction, shall be given a final-type physical examination for registrants in Class IV-E. Each such registrant shall be ordered to report for such examination when his order number is reached in the process of selecting Class I-A and Class I-A-O registrants to report for induction, provided his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired.

651.2 *Ordering Class IV-E registrants to report for final-type physical examination.*—(a) When the order number of a registrant placed in Class IV-E has been reached under the circumstances set out in section 651.1, the local board shall prepare for each such man an Order to Report for Final-type Physical Examination (Form 48A) in duplicate. The local board shall mail the original to the registrant and file the remaining copy in the registrant's Cover Sheet (Form 53).

651.3 *Separate delivery list (Form 151) for Class IV-E registrants.*—(a) Before the time set for Class IV-E registrants to report for final-type physical examination, the local board shall prepare a separate Delivery List (Form 151) for Class IV-E registrants, in triplicate, and stamp each such list at the top with the notation "IV-E." The local board shall make no entry in column 4 of this form.

651.7. Procedure for sending Class IV-E registrants to the induction station for final-type physical examination.—(a) At the time and place designated for the Class IV-E registrants to report for final-type physical examination, the local board shall:

(1) Call the roll of Class IV-E registrants.

(2) Read and issue the appointment of the leader of Class IV-E registrants.

(3) Turn over to the leader of Class IV-E registrants the transportation request or tickets and the meal and lodging requests to cover a trip to the induction station and return to the local board and records for final-type physical examination.

(4) Specifically order the Class IV-E registrants to obey their leader.

(5) Specifically order the Class IV-E registrants to report to the induction station and, after final-type physical examination, to return to the local board.

(b) Class IV-E registrants shall proceed to the induction station for their final-type physical examination along with the selected men who are being delivered to the induction station with the next call on the local board, but if there is no such delivery of men to fill a call at an early date, it shall deliver such Class IV-E registrants specially whenever the induction station is receiving men.

651.8. Final-type physical examination at induction station.—At the induction station, Class IV-E registrants will be given a final-type physical examination in the same manner as that conducted for selected men. Upon completion of the final-type physical examination, Class IV-E

registrants will return to their local board under direction of their leader.

651.9. *Records returned by induction station commander for Class IV-E registrants.*—Each local board delivering Class IV-E registrants for final-type physical examination to an induction station will receive by mail from the induction station commander the following records: (1) The original and all copies of the Delivery List (Form 151) for Class IV-E registrants and (2) the original and all three copies of the Report of Physical Examination and Induction (Form 221). The local board will then forward to the State Director of Selective Service of its State a copy of each Delivery List (Form 151) for Class IV-E registrants.

651.10 *Action of local board following final-type physical examination of Class IV-E registrants.*—(a) When the Report of Physical Examination and Induction (Form 221) indicates that a registrant in Class IV-E is physically and mentally qualified for service, such registrant will be assigned to and delivered for work of national importance under civilian direction in the manner provided in part 652. Until the registrant is forwarded for work of national importance under civilian direction, the original and all copies of the Report of Physical Examination and Induction (Form 221) of each such registrant will be retained by the local board in the registrant's Cover Sheet (Form 53).

(b) When the Report of Physical Examination and Induction (Form 221) indicates that a registrant in Class IV-E is physically, mentally, or

otherwise disqualified for service, the local board will reopen his classification and classify him in Class IV-F.

* * * * *

652.1 *Report of conscientious objector to Director of Selective Service.*—(a) When a registrant in Class IV-E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction.

* * * * *

652.2 *Assignment by Director of Selective Service.*—(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall forward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local board other than the registrant's local board, the registrant's local board will be notified of such

action so that appropriate notations may be made in its records.

* * * * *

652.11 *Preparation and distribution of Order to Report; delinquency of IV-E registrants.*—(a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in class IV-E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Armed Forces' Original, the Surgeon General's Copy, and the National Headquarters' Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Local Board's Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service: Mail or deliver to the registrant before the time set for him to report, the original of the Order to report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail

the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

* * * * *

652.12 *Transportation to camp.*—(a) When a registrant in Class IV-E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian direction as is followed in the case of a registrant delivered for induction into the land or naval forces.

* * * * *

653.1 *Work projects.*—(a) The Director of Selective Service is authorized to establish, design-

nate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or Local governmental or private agency as may be designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all work projects is vested in the Director of Selective Service.

653.2 *Camps.*—(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a Federal technical agency using funds provided by the Selective Service System and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency.

Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service.

* * * * *

653.11 *Reception at camps.*—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

(c) If the assignee indicates that his physical condition has changed since his final-type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director

of Selective Service, will be retained in the camp or hospitalized where necessary.

(d) The camp director shall complete Item 79 of the Report of Physical Examination and Induction (Form 221), changing such parts thereof as may be required. The camp director shall retain the Armed Forces' Original of the Report of Physical Examination and Induction (Form 221) and shall forward the Surgeon General's Copy and the National Headquarters' Copy thereof to the Director of Selective Service.

(e) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(f) Upon receiving notice that a registrant has been rejected for work of national importance, the local board shall reopen his classification and classify him in Class IV-F.

* * * * *

653.12 *Duties.*—Assignees shall report to the camp to which they are assigned; remain therein until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued

from time to time by the Director of Selective Service.

653.13 *Transfer*.—(a) The Director of Selective Service or any person authorized by the Director of Selective Service may order the transfer of an assignee from one camp or project to another, and no assignee shall be so transferred except when so ordered.

(b) If an assignee is transferred from one camp to another for the convenience of the assignee, such transfer shall be made at the expense of the assignee or of the religious organization desiring such transfer.

* * * *

653.15 *Release for induction into the land or naval forces*.—(a) The Director of Selective Service may release an assignee from active participation in work of national importance under civilian direction prior to the completion of his period of service for the purpose of permitting him to be inducted into the land or naval forces.

(b) An assignee's local board is authorized to change the classification of an assignee prior to his release from work of national importance under civilian direction upon receiving a request from the Director of Selective Service that the assignee's classification be reopened.

(c) When (1) an assignee makes an application to the Director of Selective Service to volunteer for induction into the land or naval forces either for combatant or noncombatant service or (2) an assignee's conduct indicates that he may have been improperly classified, the Director of Selective Service may request that the assignee's

classification be reopened and that the assignee be classified anew.

(d) An assignee's application to volunteer for induction into the land or naval forces either for combatant or noncombatant service shall be submitted to the Director of Selective Service through his camp director. Such application need not be in any particular form but shall contain the following information: The assignee's name, residence address at the time of assignment, order number, local board number and location, and the name of the camp to which he is assigned. The camp director is not required to approve or disapprove such request, but if he sees fit, he may submit a report concerning the assignee to the Director of Selective Service. Such assignee shall retain his status as an assignee and will remain in camp until released by the Director of Selective Service.

(e) Upon receipt of the request of the Director of Selective Service that the classification of the assignee be reopened, the local board shall consider the case under the provisions of part 626.

(f) If the classification of the assignee is changed by the local board to Class I-A or Class I-A-O, arrangements will be made by the Director of Selective Service for the assignee to be delivered to his local board or to a local board of transfer for induction into the land or naval forces. Such assignee shall remain in camp until released by the Director of Selective Service. Such assignee shall be furnished with necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals or Lodgings for Civilian Registrants (Form

256) for travel between the camp and his local board or local board of transfer.

653.16 *Release for some reason other than for induction into the land or naval forces.*—(a) The Director of Selective Service may release an assignee from active participation in work of national importance under civilian direction prior to the completion of his period of service under conditions which would warrant release by the Secretary of War or the Secretary of the Navy of a registrant who has been inducted into the land or naval forces.

* * * * *

APPENDIX C

MINISTRY OF LABOUR AND
NATIONAL SERVICE,
ST. JAMES'S SQUARE, LONDON, S. W. 1.,

22d August 1942.

DEAR DICKINSON: When I was in Washington I promised to let you have a note about our experience of dealing with Jehovah's Witnesses. I suppose that they are also known in America (as here) by the names of the International Bible Students Association or The Watch Tower Bible and Tract Society. As you know, this sect is of American origin. In the circumstances I need hardly trouble you with a statement about the strange beliefs held by the members or how they seek to support their claim to be neutral.

Jehovah's Witnesses of military age seem almost universally to claim to be conscientious objectors, and they support it on the basis of neutrality and various texts carefully selected from the Bible. I think that you know that under our laws the Tribunals that consider the applications of individual conscientious objectors are required to deal with them in one of the four following ways:

- (1) Register them as conscientious objectors unconditionally; or
- (2) Register them as conscientious objectors on condition that they undertake specified civilian work; or

(3) Register them as conscientious objectors but as persons liable for noncombatant military service; or

(4) Order them to be removed from the Register of Conscientious Objectors.

We have not kept separate statistics for Jehovah's Witnesses, but my impression is that they have seldom, if ever, been registered unconditionally and that they have been divided fairly evenly between the other three groups.

Many Jehovah's Witnesses claim to have consecrated their whole life to the service of Jehovah God and resolutely refuse to undertake the civilian work prescribed as a condition of registration. Appreciable numbers have been prosecuted and imprisoned for failure to comply with such conditions. Other Jehovah's Witnesses, who are liable for military service, either noncombatant or otherwise, often refuse to attend medical examination which is a statutory necessity before enlistment; prosecution follows such refusal and substantial terms of imprisonment are imposed. Women Jehovah's Witnesses have in many cases been directed under Defence Regulations to undertake civilian work, e. g. in a hospital, that could not be objectionable to a person suspected to be a conscientious objector to war, but they often, if not always, refuse; prosecution and imprisonment follow.

As I have already indicated we have no statistics to indicate how many Jehovah's Witnesses have been imprisoned, but I should not be surprised if the total of 400 claimed by the sect were somewhere near the mark.

There is another point that I should mention. Our law provides for regular ministers of religious denominations to be exempt from military service. A certain number of Jehovah's Witnesses have from time to time claimed exemption on these grounds, but the view taken here is that such a claim cannot be admitted. The Courts have not dissented from this view which we justify on the following grounds:

1. The Society of Jehovah's Witnesses in this country is not regarded as a religious denomination because the activities of the Witnesses are entirely controlled and directed by the International Bible Students Association, which is an incorporated company. This view is based on a test laid down by Lord Reading in the High Court during the last war that a religious denomination must (*inter alia*) be "a voluntary and *unincorporated* association of Christians." There is, moreover, considerable doubt as to the religious character of the work carried on by this company, as this work appears to consist mainly in the production and dissemination of tracts which are sold throughout the country by Witnesses acting under the direction of the company as a kind of sales staff remunerated by commission. Furthermore, it has been admitted on behalf of the Association that the Society is "neither a religious denomination nor a sect in the ordinary usage of these words."

2. Even if the Society could be regarded as a religious denomination, the view is taken that a person, in order to be regarded as a "regular" minister of a religious denomination must be empowered to perform and must regularly carry out all the

rites and ceremonies of the denomination which fall to be performed by a minister. The ministers or "servants" of this Society could not be regarded as regular ministers because—

(a) They cannot perform certain rites without being specifically appointed for each occasion; and

(b) Appointments to perform these rites are made only occasionally and there is apparently no guarantee that any particular individual would ever receive an appointment, or if he were once appointed, that he would be reappointed on another occasion;

(c) In any case no clear distinction in principle can be made between the general body of Witnesses and those Witnesses who are selected by the Association for special authority inasmuch as it is said that all Witnesses are ordained by God and, being appointed by the Association to act as "ministers of the Gospel", are equally qualified to perform any rites if they are specially authorized to do so. The acceptance of any of these persons as regular ministers of a religious denomination leads logically to the conclusion that every member of this so-called religious denomination should be excepted from liability on the same ground. This is a conclusion which, for obvious reasons, we are reluctant to accept.

I hope that Selective Service is flourishing and that you yourself are well. Please give my kindest regards to General Hershey.

Yours sincerely,

(S) G. MYRDDIN-EVANS.

Offices of
HAYDEN COVINGTON

117 ADAMS STREET, BROOKLYN, NEW YORK,

January 27, 1942.

Lt. Col. CARLTON S. DARGUSCH,

*Deputy Director, Selective Service System,
Washington, D. C.*

DEAR COLONEL DARGUSCH: Your letter of January 13, file 1-1.13-77, re "Pioneers of Jehovah's Witnesses."

Due to the fact that I have been away from the office on an extensive trip to various parts of the country, diligent and prompt answer was prevented to your letter concerning the course of study in the Bible and Bible helps prescribed by the Society with respect to persons admitted to pioneer status by said Society. I have taken the matter up with the Society and they advise:

No specified educational background is required of any individual precedent to admission to the pioneer ranks. However, the Watchtower Bible and Tract Society has provided eighteen and more volumes and publishes the semi-monthly magazine, the Watchtower, dealing with doctrinal and prophetic teachings of the Bible and those enrolling are required to have made a thorough study of these and subscribed to such teachings before they are accepted for pioneer service.

The Society maintains "companies," which might be called branch schools, in thousands of towns and cities throughout the United States, under the immediate direction of competent instructors, elders, ministers and "servants", duly

appointed by the Society, who regularly, not less than twice each week of the year, give instruction in the Bible. Each session of study is not less than one hour. This is done through conducting studies in the various publications above referred to, together with the Bible.

All persons who have covenanted to do the will of Almighty God and who have been acquainted with or who desire to become acquainted with the prophecies of the Bible, as revealed through the publications of the Society, are invited to and do attend such studies. They are permitted to receive instructions at such "companies" or "schools" above referred to.

Each applicant for pioneer work has attended one ~~or~~ more of these schools for a satisfactory length of time.

One desiring to enter the pioneer ranks must submit an application providing the Society with certain information, showing whether he is a student of the Watchtower magazine and the publications of the Society, for what length of time, whether he is entirely in accord with the explanations of the Bible therein contained and provide other evidence showing how long he has been connected with the local "company" of Jehovah's Witnesses and in attendance of such "schools."

If from such application, the Society is not convinced of the qualification of the applicant in that regard, a further investigation is conducted through the "company servant" and study conductors in charge of the local "company" or "school," before passing on the application.

No specified time is required in study and

preparation because of the varying ability of the different ones. The Society, as such, does not maintain so-called "divinity" schools in the manner conducted by the worldly religious institutions because it should be remembered that the Lord Jesus Christ's apostle Peter and many other faithful ministers were not required to and did not attend divinity schools. The Apostle Peter was trained as a fisherman until invited by the Lord Jesus to engage in the "ministry," and he and the other apostles were referred to by the officials and religionists of that day as "unlearned and ignorant men." Acts 4:5-13.

To be "ordained" means to be appointed by the proper authority to a position or office to perform the duties specifically assigned. Jehovah's Witnesses being selected by Jehovah God, it follows that he is the authority that ordains the servant, as it is written at Isaiah 61:1-3. That scripture states the commission of authority given by the Lord God to those persons. Since Jehovah's Witnesses operate in a legal and orderly way through their corporate representative, the Watchtower Bible & Tract Society, Inc., they also receive the earthly ordination hereinafter referred to.

No diploma or certificate, as such, is issued by the "company" or "school" where the person attends. However, after being duly admitted to the pioneer rolls, and demonstrating sincerity and ability over a satisfactory period of time, the Society issues a certificate signed by the Superintendent of Evangelists of the Society, subscribed to before a Notary Public, a sample copy of which is attached hereto, when requested by the Pioneer.

There is forwarded to all persons qualifying

themselves to act as Jehovah's witnesses, including the pioneers, a printed identification card, containing the signature of the President of the Society, acting for the Society, certifying that the bearer is an ordained minister, a sample of which has been heretofore forwarded to you.

Sincerely,

(S) HAYDEN COVINGTON.

APPENDIX D

Current Selective Service Classifications

- I-A—Available for military service (Reg. 622.11).
- I-A-O—Conscientious objector available for non-combatant military service (Reg. 622.12).
- I-C—Member of the land or naval forces of the United States, including every registrant who is, or who by induction, enlistment, or appointment becomes, a commissioned officer, warrant officer, field clerk, pay clerk, or enlisted man of any branch of such forces (Reg. 622.15).
- II-A—Man necessary in support of the war effort (Reg. 622.21).
- II-B—Man necessary in war production (Reg. 622.22).
- II-C—Man necessary to and regularly engaged in an agricultural occupation or an agricultural endeavor essential to the war effort (Reg. 622.25).
- III-A—Man who with his child or children maintains a bona fide family relationship in their home, provided such status was acquired prior to December 8, 1941 (Reg. 622.31).
- III-C—Man who is necessary to and regularly engaged in an agricultural occupation or

an agricultural endeavor essential to the war effort, and who has a wife or child with whom he maintains a bona fide family relationship in their home, or has certain other persons dependent upon him, provided such dependency status was acquired prior to December 8, 1941 (Reg. 622.31-2).

III-D—Man deferred by reason of extreme hardship and privation to his wife, child, or parent with whom he maintains a bona fide family relationship in their home (Reg. 622.32).

IV-A—Man who has attained the forty-fifth anniversary of his birth (Reg. 622.41).

IV-B—Officials deferred by law and men relieved from liability for training and service (Reg. 622.42).

IV-C—Registrants not acceptable for training and service because of nationality or ancestry, neutral aliens requesting relief from training and service, aliens not acceptable to the armed forces or to the Director of Selective Service, and non-declarant aliens who depart with intention not to return.

IV-D—Regular or duly ordained minister of religion or student preparing for the ministry in a theological or divinity school which has been recognized as such for more than one year prior to September 16, 1940, the date of enactment of the Selective Training and Service Act (Reg. 622.44).

IV-E—Registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

IV-F—Morally, physically, or mentally unfit for any military service or work of national importance (Regs. 622.61, 622.62).

FILE COPY

Office - Supreme Court, U. S.

FILED

NOV 10 1943

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 73

NICK FALBO,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE

THE NATIONAL COMMITTEE ON CONSCIEN-
TIOUS OBJECTORS OF THE AMERICAN CIVIL
LIBERTIES UNION, *Amicus Curiae*,
JULIEN CORNELL, *Counsel.*

HAROLD EVANS,
of Philadelphia, Pa.,

ERNEST ANGELL,
of New York, N. Y.,

OSMOND K. FRAENKEL,
of New York, N. Y.,

Of Counsel.

INDEX

| | PAGE |
|-----------------|------|
| Statement | 1 |
| The Facts | 2 |

ARGUMENT

| | |
|--|----|
| The court below erred in holding that errors of fact and law committed by the draft boards were not available as a defense to an indictment charging refusal to report for service under the Selective Training and Service Act of 1940..... | 3 |
| A. Analysis of the Circuit Court cases..... | 3 |
| B. Errors in the administrative proceeding upon which a criminal charge is based should be available as a defense..... | 10 |

Cases Cited

| | |
|---|--------------|
| Baxley v. United States, 134 Fed. 2d 998..... | 9 |
| Edwards v. U. S., 312 U. S. 473..... | 11 |
| Goff v. United States, 135 Fed. 2d 610..... | 9 |
| Johnson v. United States, 126 Fed. 2d 242..... | 9 |
| Rase v. United States, 129 Fed. 2d 204..... | 9 |
| United States v. Bowles, 131 Fed. 2d 818, aff'd on other grounds 319 U. S. 33..... | 5, 6 |
| United States v. Grieme, 128 Fed. 2d 811..... | 1, 3, 6 |
| United States v. Kauten, 133 Fed. 2d 703..... | 5, 8, 10, 12 |
| United States ex rel. Phillips v. Downer, 135 Fed. 2d 521 | 9 |
| U. S. v. The Associated Press, — Fed. Supp. —, New York Times, October 7, 1943..... | 12 |

Statutes, Etc.

| | PAGE |
|--|-------|
| Articles of War, Sec. 64..... | 9 |
| New York Times, August 27, 1943..... | 1, 8 |
| Selective Training and Service Act of 1940: | |
| Section 5g | 6 |
| Section 11 | 5 |
| The Conscientious Objector and the Law, by Julien Cornell | 9, 11 |
| U. S. Constitution, Amendment VI..... | 11 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 73.

NICK FALBO,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE*

Statement

Over two thousand young men claiming to be conscientious objectors, half of them like the petitioner being also Jehovah's Witnesses, have been imprisoned on criminal charges arising out of their refusal of draft service.¹ But much more extraordinary than this imprisonment for conscience is the fact that these men were convicted and imprisoned *without a day in court*, because of a procedural rule which was applied to prevent them from interposing any defense.²

1. New York Times, August 27, 1943.

2. See *United States v. Grieme*, 128 Fed. 2d 811, relied upon by the court below in upholding the conviction of petitioner after his defense had been excluded.

Unless this court strikes down that rule of law as it has been applied here, conscientious objectors will continue to be convicted and imprisoned without the trial at law, the day in court, which has until now been regarded by the courts as the inalienable right of every citizen. The court is thus confronted in this case with the wholesale destruction of civil rights for an unpopular minority, which is of such far-reaching importance that permission to file this brief, *amicus curiae*, has been asked by the National Committee on Conscientious Objectors of the American Civil Liberties Union.

The Facts

Since a complete statement of the facts may be found in the brief filed by counsel for the petitioner, suffice it to state here that the petitioner registered under the Selective Training and Service Act of 1940 but claimed exemption from military service both as a minister, being a member of the sect known as Jehovah's Witnesses, and as a conscientious objector; he was classified in Class IV-E as a conscientious objector and ordered to report to work assigned to men of that class; this he refused to do, claiming that the classification and order to report were erroneous and illegal on the ground that he was entitled to exemption from any service whatever as a minister of religion; he was indicted, pleaded not guilty, was "tried", convicted, and sentenced to five years' imprisonment; at the so-called trial the court excluded evidence offered by the petitioner to show that he was a duly ordained and acting minister of religion and charged the jury that the action of the draft boards in denying this claim was not subject to judicial review, even in a crim-

inal case, whereupon the jury promptly found the petitioner guilty.³

ARGUMENT

The court below erred in holding that errors of fact and law committed by the draft boards were not available as a defense to an indictment charging refusal to report for service under the Selective Training and Service Act of 1940.

The sole point raised in this brief relates to the ruling made by the trial court and sustained in the Circuit Court of Appeals which prevented the petitioner from asserting his defense, namely, that the draft boards in denying his claim to exemption as a minister, committed an error of law in their construction of the statutory provision for exemption, and made an arbitrary, capricious and unreasonable finding of fact, which rendered the order to report to work, which he admitted having disobeyed, illegal and void.

A. Analysis of the Circuit Court Cases

The Circuit Court of Appeals in the decision here reviewed⁴ gave no reason for its ruling other than to refer to *United States v. Grieme*, decided by the Circuit Court of Appeals for the Third Circuit in June, 1942.⁵ The *Grieme* case was the first case in which appeared the rule that one who had refused induction claiming that he had been illegally classified could not challenge the validity of classification or induction in a criminal prosecution

3. R. 40-60.

4. 135 Fed. 2d. 464.

5. 128 Fed. 2d. 811.

resulting from his refusal to be inducted. In that case, as here, the defendant had claimed to be entitled to exemption as a minister, but was nevertheless classified as available for work as a conscientious objector, which he refused by not reporting for such work. The trial judge excluded the evidence offered by the defendant to show that he was illegally classified, and charged the jury that they could not consider whether the draft board acted properly, as this was irrelevant. After referring to the line of cases holding that decisions of draft boards are final unless they fail to give a fair hearing, act contrary to law, or make decisions which are arbitrary, capricious and unreasonable, the court without any citation of authority concluded:⁶

"We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts. The court below therefore properly excluded the matter proffered in defense by the present appellants."

The court overlooks the fact that if the orders were unlawful, then the defendants committed no "dereliction". Furthermore, they cannot be criticised for attacking the orders collaterally, since no direct attack on such orders is allowed by the draft law, which contains no provision

6. 128 Fed. 2d 811 at 815.

for judicial review. Habeas corpus, which the court sanctions for review of draft orders, is as much a collateral attack as an attack made in defense to an indictment. Thus both the reasons given by the court for its decision, and it gave no others, are based on fallacious reasoning.

The same court a few months later decided a similar case, *United States v. Bowles*,⁷ involving this time a conscientious objector who had refused to report for induction after a classification by the appeal board which was plainly contrary to law, in that the test of conscientious objection contained in the 1917 draft law rather than the present law was applied. Conceding that the case disclosed, upon the defendant's allegations, a gross violation of his rights, the court followed the precedent of its earlier decision in the *Grieme* case, adding that by continuing the jurisdiction of the civil authorities over drafted men until inducted, Congress may have unintentionally deprived of any judicial review persons who are conscientiously unable to submit to induction, but if so their remedy lies in legislative action or executive clemency.⁸ This explanation explains nothing except the harshness of the rule applied. The provision of the law,⁹ unlike the 1917 law, that civil jurisdiction remains until induction surely does not *reduce* the jurisdiction of the civil authorities!

Perhaps because of the precedent of these cases, the Circuit Court of Appeals for the Second Circuit reached the same result in *United States v. Kauten*,¹⁰ also involving a conscientious objector who had refused induction claiming that he had been illegally denied exemption from

7. 131 Fed. 2d. 818, affirmed on other grounds, 319 U. S. 33.

8. 131 Fed. 2d. 818, at page 819.

9. Selective Training and Service Act of 1940, section 11.

10. 133 Fed. 2d. 703.

military service by reason of a narrow and erroneous construction by the draft boards of the requirement of the statute¹¹ that the objection stem from "religious training and belief." The Court held that such a defense was properly excluded by the Trial Judge, but for somewhat different reasons from those advanced in the *Grieme* and *Bowles* cases:¹²

"Even though the Local Draft and Appeal Boards may have committed an error of law in classifying a conscientious objector as a man available for combat service his rights under Section 5 (g) are not abridged in any practical sense until he is subjected to military 'training and service' after formal induction into the Army. Prior to that time he has suffered only the inconvenience incident to his status as a party to an administrative proceeding—the general sort of inconvenience to which parties customarily submit in proceedings before the Interstate Commerce Commission, National Labor Relations Board, and many other federal and state tribunals including courts of law. The justification for the burden upon the individual of subjecting him to such proceedings instead of stopping them at the outset by injunctive or other relief in the courts lies in the absence of an alternative consistent with the orderly conduct of the government's business, and in this particular case, in the want of any suitable alternative method of selecting the personnel of a large Army. On such grounds the Supreme Court in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, denied relief to an employer seeking to escape the burden of a National Labor Relations Board proceeding because its business was not in interstate or foreign commerce and because the holding of the hearings

11. Section 5g, Selective Training and Service Act of 1940.

12. 133 Fed. 2d. 703 at 706.

would cause damage due to the incidental expense, inconvenience and impairment of its goodwill and of harmonious relations with its employees. The decision of the same court on January 11, 1943, in *Endicott Johnson Corp. v. Perkins*, is to a like effect. See also *Fed. Power Comm'n v. Edison*, 304 U. S. 375, 384; *United States v. Illinois Central R. Co.*, 244 U. S. 82. Indeed it has become the general rule that where Congress has delegated to an administrative authority a certain field of governmental activity and made its acts final, the courts will not interfere until the administrative proceedings have been concluded and any administrative remedy that may exist has been exhausted. Under this rule there would seem to have been no good reason for interrupting proceedings leading to induction until some substantial physical restraint occurred. Then the writ of habeas corpus is sufficient to remedy any irregularities of Draft Boards and to satisfy all reasonable scruples on the part of inductees. Moreover, it is the practice of the Army to grant a furlough of seven days after a registrant is formally inducted before he is subjected to military training. This gives him time to apply for a writ of habeas corpus without disturbing the selective service machinery, if he thinks that his rights as a conscientious objector have been infringed.

It results from the foregoing that the registrant was bound to obey the order to report for induction even if there had been error of law in his classification. The Administrative Board had jurisdiction of his case and its order could not be wilfully disregarded."

The wisdom of applying this rule of administrative procedure, a rule of convenience, to a criminal case where it has the tragic effect of denying the defendant the right to make a defense is open to serious question. This will

be discussed hereafter. But it should be noticed that even if the rule is applicable to criminal cases of this sort, it is not controlling here. The Court says in the *Kauten* opinion that the rule protecting administrative decisions from attack applies for three reasons: (1) because the orderly conduct of the Government's business requires it, (2) because the administrative proceeding is not ended until after induction, and (3) because the writ of habeas corpus available after induction is sufficient to satisfy all reasonable scruples of inductees.

Each one of these reasons is based on false assumptions of facts which the court could judicially notice but which it apparently did not fully understand. (1) The draft process would not become less orderly if courts are to allow a man accused of crime to defend himself by challenging the validity of his draft classification, for the simple reason that exceedingly few men prefer the risk of criminal prosecution to the unpleasantness of being drafted, as shown by the government's own figures on draft violations.¹³ (2) The administrative process does not remain open until induction is completed. When the order to report for induction is issued, the Selective Service authorities close their files. The induction itself is handled by the military establishment. The administrative process, then, is ended just prior to induction with the issuance of an order to report to the military authorities for examination and induction. The refusal upon which the indictment was based occurred *after* this order was issued and, therefore, *after the administrative process ended*; and so could not, as the court feared, interrupt the administrative process. (3) All reasonable scruples of inductees are not satisfied by the availability of habeas

13. New York Times, August 27, 1943.

corpus to question the classification, after induction, unless it can be said that the two thousand who preferred prison to induction were all unreasonable, and only the two or three were reasonable who were willing to swallow their scruples for the time being and accept induction with the risk of court martial and long imprisonment or sentence of death.¹⁴

One of these two or three who had the temerity to risk court martial for the sake of getting the only judicial review vouchsafed by the courts was the subject of the decision of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Phillips v. Downer*.¹⁵ Here the court approved the granting of review by habeas corpus to one who submitted to induction for the purpose of getting such review and thereafter refused to recognize the jurisdiction of the army over him or to obey any military commands. The castigation which this conscientious objector received at an army camp, not to mention his confinement in the guard house and the threat of court martial, although as it turned out the court found him to have been illegally classified, are sufficient to demonstrate why this method of review is insufficient for all but a hardy few, and why two thousand have preferred imprisonment.¹⁶

The other cases add little or nothing to the reasoning of the *Grieme*, *Bowles* and *Kauten* opinions, although exhibiting varying degrees of disagreement therewith.¹⁷

We realize that the present case deals only with a refusal to go to a civilian public service camp on the part

14. See Article 64, Articles of War, 10 U.S.C. section 1536.

15. 135 Fed. 2d. 521, decided May 7, 1943.

16. See Chapter 7, *The Conscientious Objector and the Law*, by Julien Cornell, The John Day Company, New York, 1943.

17. *Baxley v. United States*, 134 Fed. 2d. 998, *Goff v. United States*, 135 Fed. 2d. 610, *Rase v. United States*, 129 Fed. 2d. 204, *Johnson v. United States*, 126 Fed. 2d. 242.

of a registrant claiming exemption from any sort of service on the claim of being a minister. Although we have discussed the case of a registrant refusing induction on the ground of being a conscientious objector, we feel that the principles discussed there are applicable to the case at bar.

In both types of cases submission to the order of the draft board involves the doing of an act which is the basis for the registrant's refusal and inability to obey because of conscientious scruples.

B. Errors in the administrative proceeding upon which a criminal charge is based should be available as a defense.

With the growth of administrative law, and the increasing judicial functions of administrative bodies, has arisen the necessity of protecting the administrative board from being hampered in its work by resort of litigants to the courts. Therefore, as brought out in the *Kauten* opinion quoted above, the courts will not interfere with administrative proceedings by injunction or other collateral attack, as this would hopelessly disrupt the orderly functioning of administrative boards.

This rule, heretofore confined to civil proceedings, has here been applied to prevent a man accused of crime from asserting in his defense that the administrative order which he violated was invalid. Thus the petitioner here was denied the fundamental right of a fair trial, indeed he had no trial at all as he was unable to present his only defense. As the petitioner has argued at length in his brief, the action of the trial judge in excluding the defense runs contrary to the conception of fair trial which is one of the cardinal tenets of Anglo-American jurisprudence. Whatever short cuts may be necessary to pro-

mote justice in civil litigation, the law has never allowed the rights of defendants in criminal trials to be whittled away for the sake of clearing the court's calendar, or speeding the work of administrative boards, or for any other reason.

The net result of this procedure is to permit administrative agencies to find men guilty of crime, the courts becoming mere rubber stamps. This is especially pernicious when it is realized that the hearings held by the draft boards on conscientious objectors do not approach the requirements of due process. The hearing is based on a secret investigation by the Federal Bureau of Investigation, so that the accused is not confronted by the evidence or the witnesses against him, he is denied the right of counsel, he is judged by a single hearing officer at a private hearing, this judgment is then passed upon by an appeal board which does not even see the registrant or the minutes of the hearing or the report of the F. B. I.¹⁸ After such a hearing the conscientious objector is told that he may have no review in the courts except upon the intolerable condition that he submit to induction. The same is true, *mutatis mutandis*, of those who claim exemption as ministers of religion. This comes close to the gestapo methods which are so revolting to Americans.

The right of the accused in a criminal case to a fair trial is protected by the Constitution,¹⁹ and has always been zealously guarded. It includes the right to present all defenses which the accused may possess.²⁰ If an exception is now to be carved out of the rights of the accused,

18. See "The Conscientious Objector and the Law" by Julien Cornell, John Day Co., 1943, pages 26, 27.

19. Amendment VI.

20. See *Edwards v. U. S.*, 312 U. S. 473, 482, where the court said: "The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

there should be not only a good reason but a compelling reason for so doing.

The only plausible reason advanced by the government for excluding the defense offered here is that the administrative order cannot be reviewed in such cases as this without thereby disrupting the draft process. As against the feared disruption of orderly processes of government which might result from such review, the court in the *Kauten* case, *supra*, weighed the inconvenience resulting to the defendant. Such a balancing of equities, while it may be necessary in civil controversies where a rule of reasonableness is often applied,²¹ should have no application to a criminal trial where the defendant must be proved guilty beyond a reasonable doubt. But even if human freedom can be weighed in the balance against the convenience of administrative processes, still the government's argument is not sound.

The denial to the petitioner and two thousand others like him of any opportunity to present a defense has had but one effect, the imprisonment of these men without court consideration of the errors which may have occurred in the administrative process. The orderly operation of the draft has not been promoted, since whether or not the courts will hear them, these men would not consent to being drafted. What difference does it make to the draft authorities then, whether the petitioner is allowed to assert his defense or not? He is not available to the draft in either case, since he acts on the basis of moral and religious principles which are superior to his personal well being, and prefers prison rather than violate his scruples.

21. See *U. S. v. The Associated Press*, Times, October 7, 1943, page 16, cols. 4, 5.

The only way to avoid such unconscionable results, the only way to put an end to rule by bureaucratic fiat and to restore the rule of law in these cases, is by protecting the right of the conscientious objector or minister accused of crime to assert errors of draft boards in his defense to a criminal charge of a violation of the Selective Service Act.

Respectfully submitted,

THE NATIONAL COMMITTEE ON CONSCIENTIOUS OBJECTORS OF THE AMERICAN CIVIL LIBERTIES UNION, *Amicus Curiae*,

JULIEN CORNELL, *Counsel*.

HAROLD EVANS,
of Philadelphia, Pa.,

ERNEST ANGELL,
of New York, N. Y.,

OSMOND K. FRAENKEL,
of New York, N. Y.,

Of Counsel.

■

"We who strive at your bar venture to think ourselves also in some measure consecrated to the task of administering justice. Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronouncements of this Court. It is for us to bring the cases and to present for your corrective action any wrongs and injustices that result from operation of the law."

—*Robert H. Jackson.**

*Address of the Attorney General of the United States to the Chief Justice and Associate Justices at the ceremonies in commemoration of the 150th Anniversary of the Supreme Court, February 1, 1940.

INDEX

SUBJECT INDEX

| | PAGE |
|---|------|
| Grounds | 3 |
| DISCUSSION | 4 |
| The American Doctrine of Judicial Supremacy | 4 |
| Judicial Legislation Transforms Statute into an Act of Attainder | 7 |
| Constitutional Requirement of Unpenalized Judicial Review | 26 |
| Constitutional Inadequacy of Judicial Review by Habeas Corpus After Induction | 34 |
| Constitutional Requirement as to Rules of Statutory Construction Allowing Usual Criminal Defenses | 38 |
| Rule of Non-interference with Interlocutory Administrative Orders Applicable only to Civil and Not to Criminal Cases | 53 |
| Constitutional Requirement of <i>De Novo</i> Judicial Review of "Jurisdictional Facts" | 59 |
| Constitutional Requirement of Judicial Inquiry as to Board's Adherence to Due Process in its Administrative Functions | 72 |
| Mr. Justice Rutledge's Concurring Opinion | 79 |
| Constitutional Requirement of Trial by Jury Violated by Instructed Verdict of Guilty | 81 |
| Court's Decision and the War Effort | 83 |
| Conclusion | 85 |
| Certificate | 85 |

CASES CITED

PAGE

| | |
|---|--------|
| American Federation of Labor v. N. L. R. B. | |
| 308 U. S. 401 | 51 |
| Anniston Mfg. Co. v. Davis | |
| 301 U. S. 337, 351-352 | 50 |
| Baltimore & Ohio R. Co. v. United States | |
| 298 U. S. 349 | 74 |
| Bank of Columbia v. Okely | |
| 4 Wheat. 235 | 39 |
| Baxley v. United States | |
| 134 F. 2d 998 | 76 |
| Beazell v. Ohio | |
| 269 U. S. 163, 169 | 26 |
| Blair v. United States | |
| 241 F. 217 | 81 |
| Borax Consolidated, Ltd. v. Los Angeles | |
| 296 U. S. 10 | 70 |
| Bridges v. California | |
| 314 U. S. 252 | 58 |
| Brown v. Wyatt Food Stores | |
| 49 F. Supp. 538, 540 | 64 |
| Burfenning v. Chicago St. P. R. Co. | |
| 163 U. S. 322, 323 | 70 |
| Burrus, In re | |
| 136 U. S. 586 | 48 |
| Cain v. United States | |
| 19 F. 2d 472 | 81 |
| Carolina Aluminum Co. v. Federal Power Comm'n | |
| 97 F. 2d 435 | 37 |
| Castleton Corp'n v. Sinclair | |
| 264 U. S. 543 | 51 |
| Chambers v. Florida | |
| 309 U. S. 227, 236-241 | 82 |
| Chicago, M. & St. Ry. Co. v. Minnesota | |
| 134 U. S. 418, 456-458 | 51, 66 |
| Chicago, R. I. & P. R. Co. v. United States | |
| 284 U. S. 80 | 37 |

CASES CITED

| | PAGE |
|---|------------------------|
| Cobbledick v. United States | |
| 309 U. S. 323 | 49 |
| Columbia Broadcasting System v. United States | |
| 316 U. S. 407, 425 | 65 |
| Consolidated Edison Co. v. N. L. R. B. | |
| 305 U. S. 197, 229, 230 | 76 |
| Crowell v. Benson | |
| 285 U. S. 22, 62 | 40, 51, 68, 69, 70, 71 |
| Cummings v. Missouri | |
| 4 Wall. 277 | 20-24 |
| David L. Moss Co. v. United States | |
| 103 F. 2d 395 | 51 |
| Dayton Goose Creek Ry. Co. v. United States | |
| 263 U. S. 456, 486 | 50, 67 |
| Diaz v. United States | |
| 223 U. S. 442 | 63 |
| Dismuke v. United States | |
| 297 U. S. 167, 172 | 39 |
| Doolan v. Carr | |
| 125 U. S. 618, 625 | 72 |
| Dowdell v. United States | |
| 221 U. S. 325, 330 | 63 |
| Dunlop v. United States | |
| 165 U. S. 486 | 65 |
| Edwards v. United States | |
| 312 U. S. 473 | 63 |
| Edwards v. United States | |
| 7 F. 2d 357 | 65 |
| Fasulo v. United States | |
| 272 U. S. 620, 629 | 40, 65 |
| Federal Radio Comm'n v. Nelson Bros. | |
| Bond & M. Co. | |
| 289 U. S. 266, 278 | 51 |
| Fisk, Ex parte | |
| 113 U. S. 713, 718 | 48 |

CASES CITED

PAGE

| | |
|--|------------|
| Fletcher v. Peck | |
| 6 Cranch 137 | 16, 21 |
| Funk v. United States | |
| 265 U. S. 371, 381 | 44 |
| Givings v. Zerbst | |
| 255 U. S. 11, 20 | 70 |
| Goff v. United States | |
| 135 F. 2d 610 | 76 |
| Gonzales v. Williams | |
| 192 U. S. 1 | 36, 37, 69 |
| Gordon v. United States | |
| 117 U. S. 697 | 5 |
| Grimley, In re, | |
| 137 U. S. 147 | 70 |
| Gunning v. Cooley | |
| 281 U. S. 90 | 77 |
| Harriman v. Interstate Commerce Comm'n | |
| 211 U. S. 407, 422 | 40 |
| Harrison v. Vose | |
| 50 U. S. 372, 378 | 38 |
| Helvering v. Hammel | |
| 311 U. S. 504, 510 | 38, 39 |
| Hovey v. Elliott | |
| 167 U. S. 409, 413-418 | 61 |
| Interstate Commerce Comm'n v. | |
| Louisville & N. R. Co. | |
| 227 U. S. 88 | 79 |
| Jones v. Securities & Exchange Comm'n | |
| 298 U. S. 1, 23-24 | 65 |
| Kansas City Sou. R. Co. v. Ogden Levee Dist. | |
| 15 F. 2d 637 | 36 |
| Kessler v. Strecker | |
| 307 U. S. 22, 34-35 | 69 |
| L. & N. R. Co. v. Finn | |
| 235 U. S. 601, 606 | 77 |

CASES CITED

| | PAGE |
|--|--------|
| Lane v. Wilson | |
| 307 U. S. 268 | 35 |
| Lisemba v. California | |
| 314 U. S. 219, 236 | 62 |
| Lloyd Sabaudo, etc. v. Etling | |
| 287 U. S. 329 | 69 |
| Marbury v. Madison | |
| 1 Cranch 137 | 6, 12 |
| McVeigh v. United States | |
| 11 Wall. 259, 267 | 53 |
| Mercoid Corp'n v. Mid-Continent Investment Co. | |
| Nos. 54 & 55, October Term, 1943 | 77 |
| Miller v. Standard Nut Margarine Co. | |
| 284 U. S. 498 | 77 |
| Milligan, Ex parte | |
| 2 Wall. 2, 120 | 83 |
| Missouri Pac. Ry. Co. v. Boone | |
| 270 U. S. 466 | 40 |
| Missouri Pac. Ry. Co. v. Nebraska | |
| 217 U. S. 196, 207-208 | 32, 66 |
| Monongahela Bridge Co. v. United States | |
| 216 U. S. 177, 195 | 41 |
| Morgan v. United States | |
| 298 U. S. 468, 479-481 | 78 |
| 304 U. S. 1, 14-15 | 78 |
| Morton v. Nebraska | |
| 21 Wall. 660 | 70 |
| Ng Fung Ho v. White | |
| 259 U. S. 276, 284 | 69 |
| N. L. R. B. v. Bradford Dyeing Ass'n | |
| 310 U. S. 318 | 76 |
| N. L. R. B. v. Jones Laughlin Steel Corp'n | |
| 301 U. S. 1, 30 | 8, 40 |
| Noble v. Union River Logging R. Co. | |
| 147 U. S. 165 | 70 |

CASES CITED

| | PAGE |
|---|------------|
| Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio | |
| 301 U. S. 292, 304-305 | 55, 79 |
| Ohio Valley Water Co. v. Ben Avon Borough | |
| 253 U. S. 287, 289 | 52, 66 |
| Oklahoma Operating Co. v. Lowe | |
| 252 U. S. 331 | 31, 34, 66 |
| Ong Chang Wing, v. United States | |
| 218 U. S. 272, 279 | 61 |
| Ozawa v. United States | |
| 260 U. S. 178, 194 | 38 |
| Panama Ref'g Co. v. Ryan | |
| 293 U. S. 388 | 64 |
| Patton v. United States | |
| 281 U. S. 276, 290 | 55, 81 |
| Pierce v. United States | |
| 314 U. S. 306, 311-312 | 38 |
| Plymouth Coal Co. v. Pennsylvania | |
| 232 U. S. 531, 546 | 40 |
| Railroad Comm'n of California v. Pac. Gas & Electric Co. | |
| 302 U. S. 388 | 77 |
| Railroad Comm'n of Minnesota v. Duluth St. R. Co. | |
| 273 U. S. 625 | 35 |
| Rochester Telephone Corp'n v. United States | |
| 307 U. S. 125 | 76 |
| Rogers v. Peck | |
| 199 U. S. 425, 435 | 61 |
| Rose v. Himely | |
| 4 Cranch 241, 269 | 72 |
| St. Joseph Stock Yards Co. v. United States | |
| 298 U. S. 38, 50-52 | 73 |
| St. Louis & San Francisco Ry. v. Gill | |
| 156 U. S. 649, 666 | 50, 66, 74 |

CASES CITED

| | PAGE |
|--|--------|
| Shannahan v. United States | |
| 303 U. S. 596 | 51 |
| Sibbach v. Wilson & Co. | |
| 312 U. S. 1, 16 | 48 |
| Skinner & Eddy Corp'n v. United States | |
| 249 U. S. 557 | 36 |
| Smelting Co. v. Kemp | |
| 104 U. S. 636, 641 | 70 |
| Sorrells v. United States | |
| 287 U. S. 430, 446 | 38 |
| South Chicago Coal and Dock Co. v. Bassett | |
| 309 U. S. 251 | 76 |
| Spiller v. A. T. & S. F. R. Co. | |
| 253 U. S. 117 | 76 |
| State ex rel. Wilson v. Russell | |
| 146 Fla. 539, 1 S. 2d 569 | 59 |
| Tot v. United States | |
| 319 U. S. 463, 473 | 64, 65 |
| Truax v. Corrigan | |
| 257 U. S. 312, 332 | 6, 63 |
| United States ex rel. Creary v. Weeks | |
| 259 U. S. 336 | 33 |
| United States ex rel. French v. Weeks | |
| 259 U. S. 326 | 33 |
| United States ex rel. Vajtauer v. Commissioner | |
| 273 U. S. 103 | 77 |
| United States v. American Trucking Ass'n | |
| 310 U. S. 534 | 38 |
| United States v. Chase | |
| 135 U. S. 255, 261 | 40 |
| United States v. Delaware & Hudson Co. | |
| 213 U. S. 366, 408 | 40 |
| United States v. Griffin | |
| 303 U. S. 226 | 51 |

CASES CITED

| | PAGE |
|---|------------|
| United States v. Idaho | |
| 298 U. S. 105, 109-110 | 71 |
| United States v. Jin Fuey Moy | |
| 241 U. S. 394, 401 | 40 |
| United States v. Kirby | |
| 7 Wall 482, 486-487 | 38 |
| United States v. Morris | |
| 39 U. S. 464 | 38 |
| United States v. Reid | |
| 53 U. S. 361, 363-365 | 43, 44 |
| United States v. Stevenson | |
| 215 U. S. 190, 199 | 61, 81 |
| United States v. St. Paul M. & R. Co. | |
| 247 U. S. 310, 313 | 39 |
| United States v. Sing Tuck | |
| 194 U. S. 161 | 33 |
| Utley v. St. Petersburg | |
| 292 U. S. 106 | 35 |
| United States v. Taylor | |
| 281 U. S. 276 | 81 |
| Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n | |
| 306 U. S. 56 | 51 |
| Ver Mehren v. Sirmeyer | |
| 36 F. 2d 876, 882 | 70 |
| Viereck v. United States | |
| 318 U. S. 236, 247-249 | 81 |
| W. V. & M. Coach Co. v. N. L. R. B. | |
| 301 U. S. 142, 147 | 76 |
| Wadley Sou. Ry. Co. v. Georgia | |
| 235 U. S. 651 | 26, 30, 66 |
| White v. Chin Fong | |
| 253 U. S. 90 | 77 |
| Willcox v. Consolidated Gas Co. | |
| 212 U. S. 19, 53 | 32, 66 |

CASES CITED

| | PAGE |
|----------------------------------|------------|
| Wise v. Withers | |
| 3 Cranch 331 | 64, 68 |
| Wong Wing v. United States | |
| 163 U. S. 228 | 63 |
| Wright v. Vinton Branch of Mt'n | |
| Trust Bank of Roanoke | |
| 300 U. S. 440 | 40 |
| Yonkers v. United States | |
| No. 109 October Term, 1943 | 71 |
| Young, Ex parte | |
| 209 U. S. 123, 147 | 28, 29, 66 |

STATUTES CITED

| | |
|--|------------------|
| United States Code | |
| Title 18, Section 452 | 42 |
| Title 18, Section 457 | 42 |
| Title 18, Section 466 | 42 |
| Title 28, Section 635 | 44 |
| United States Constitution | |
| Article I, Section 9, Clause 3 | 3, 7, 45 |
| Article III | 3, 7, 81 |
| Amendment V | 3, 7, 44, 53, 81 |
| Amendment VI | 3, 7, 44, 81 |
| United States Statutes | |
| Act of June 4, 1920 (41 Stat. 787) Sec. 1, ch. II .. | 27 |
| Act of 1940, Selective Training and Service | |
| (54 Stat. 885, 50 U.S.C. Appendix ss. 301-318) | |
| Section 5 (d) | 26, 47, 75 |
| Section 11 | 7, 9, 44-45, 54 |

SELECTIVE SERVICE MATERIAL

| | PAGE |
|--|--------|
| Selective Service Regulations | |
| Section 623.2 | 75 |
| Section 623.21 | 76 |
| Section 625.1 | 78 |
| Section 625.2 | 78 |
| Section 627.25 | 76 |
| Section 627.26 | 76 |
| Director's Notes to Part 622.44 | |
| (National Headquarters Opinion No. 14) ... | 75, 77 |

MISCELLANEOUS CITATIONS

| | |
|--|------------|
| ALMIGHTY GOD, Word of [The Bible]: | |
| Proverbs 29: 25 | 83 |
| Psalms 111: 10 | 83 |
| Advisory Committee on Rules of Criminal Procedure, | |
| Final Report of, November 1943, Rule 28 | 44 |
| Bacon, Francis, "Of Judicature" | 60 |
| Cardozo, Benjamin N., <i>The Nature of the Judicial Process</i> (New Haven, 1921), pp. 92-94 | 5 |
| <i>Catholic Encyclopedia, The</i> , Vol. II, p. 59 | 16 |
| <i>Commentaries on the Constitution, Story,</i> | |
| Vol. 2, p. 653 | 19, 80 |
| Cooley, <i>Constitutional Limitations</i> , 8th ed., | |
| Vol. 1, pp. 536-539 | 17-19 |
| Elliott, Jonathan, <i>Debates on the Adoption of the Federal Constitution</i> (Washington, 1945), | |
| Vol. 5, p. 462 | 12 |
| <i>Encyclopedia Britannica</i> , 1942 ed., Vol. 2, p. 656 .. | 17 |
| <i>Famous Trials of History</i> , Birken- head (Doubleday, Doran & Co., 1926), | |
| Vol. 1, pp. 33-47 | 24 |
| <i>Federal Administrative Law</i> , Vom Baur (New York, 1942), Volume 1 | 72, 74, 76 |
| <i>Federalist, The</i> , Nos. 44 and 84 | 12 |

MISCELLANEOUS CITATIONS

| | PAGE |
|--|---------------|
| Hughes, Chief Justice Charles Evans, Address on occasion of 150th anniversary of the Supreme Court, February 1, 1940 | 59 |
| Jefferson's <i>Works</i> , Vol. 3, p. 223 | 5 |
| <i>Jones on Evidence, Civil Cases</i> , 4th Ed., Vol. 1, pp. 176-180 | 65 |
| Kellogg, Major Walter G., " <i>The Conscientious Objector</i> " (Boni & Liveright, N. Y., 1919) | 27 |
| "Statement by the Third Ass't Secretary of War Concerning the Treatment of Conscientious Objectors in the Army" (Gov't Printing Office, 1919) | 27, 28 |
| Lewis, "Appeal Procedure Under the Selective Service Law" 17 Ind. Law Journal 273, 281-282 | 76 |
| Stone, Harlan Fiske, "The Conscientious Objector," 21 Columbia U. Quarterly 253 (1919) | 27 |
| Story, <i>Commentaries on the Constitution of the United States</i> (Bigelow, 1891); Vol. 2, p. 216, sec. 1344 | 19, 80 |
| Taft, Wm. Howard, Special message to Congress August 15, 1911 | 6 |
| <i>Underhill's Criminal Evidence</i> , pp. 49-54 | 65 |
| Webster, Daniel, <i>Works</i> , Vol. 3, p. 176 | 6 |
| Wooddeson, Richard, <i>A Systematical View of the Laws of England</i> (London, 1777), Lecture XLI, pp. 621-648 | 8, 10, 25, 28 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

THE UNITED STATES OF AMERICA



**ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**Petitioner's
PETITION FOR REHEARING**

MAY IT PLEASE THE COURT:

To persuade one justice who concurred in the judgment to *desire* reconsideration, and to aid a 'majority of the court to so determine', is the delicate and difficult task petitioner here undertakes. He realizes that upon a clear showing that grave error was committed in deciding this case, members of this court will be the first to acknowledge the mistake and

promptly take steps to correct it. The fact that the court carefully and thoroughly considered issues presented does not alone establish *correctness* of its conclusions, as was exemplified by its original decisions on the *flag* and *license-tax* cases involving rights of Jehovah's witnesses.

This petition is NOT A REHASHING of what was previously written and said. It raises an entirely new proposition on constitutional law which affects the construction of the statute. Many additional cases, *conflicting* with conclusions reached in this case, are discussed.

If this court erred, as is here charged, an irreparable injury will flow from the decision. Hundreds, yes, thousands, of innocent persons will suffer illimitable harm. A belated correction of error will do little or no good. In this land there is no higher human agency to which an appeal for correction can be made. These facts, together with the court's position of high trust and heavy obligation owed to the people through the Constitution—of which this court is at all times conscious—should suggest to those justices constituting the majority to cast aside any human predilections in favor of their previously expressed opinion while considering this petition, and to regard the questions as though they had never been decided by this court.

On this there can be no middle ground. Either the dissenting justice is deadly wrong and petitioner's counsel has a serious case of agnosia, or else the majority justices have

committed one of the most grievous errors against the constitutional right to a judicial trial that has, in the history of the court, ever occurred. Counsel asks indulgence of the court as this difficult and delicate task is approached and tackled.

Grounds

1. Grave error has been committed by this court in construing the statute and regulations thereunder so as to constitute a bill of attainder contrary to clause 3, section 9, of Article I of the United States Constitution.

2. This court committed fundamental error in construing the Act and Regulations so as to violate the rights of petitioner contrary to Article III of the United States Constitution and the Fifth and Sixth Amendments thereto.

3. This court committed fundamental error in holding that in a criminal prosecution for refusal to comply with a final order of the local board the district court could not inquire whether the board had jurisdiction over the petitioner to order him to report for induction or acted wholly in excess of its authority, and contrary to the Act.

4. This court committed fundamental error in holding that petitioner is properly denied judicial review of the order of the local board because he failed to comply with said final order in the selective process under the Act.

5. This court committed fundamental error in holding that petitioner could not show in defense to the indictment that he was exempt from duty under the Act because a *minister of religion*.

6. This court committed fundamental error in overruling the assignments of error.

7. This court committed fundamental error in affirming the judgments of the courts below.

DISCUSSION

The American doctrine of judicial supremacy.

established by the people of the United States through the Constitution places this court in a high and peculiarly responsible position that abrogates the erroneous conclusions reached by the court in this case.

To avoid oppression of the people by usurpation of power, this court, as expositor and protector of the fundamental law, carries the grave duty of maintaining the delicate balances of the three branches of government. In discharging this supreme and direct responsibility to the people the court cannot surrender its judicial power nor transfer its responsibility to make judicial determinations to an executive or legislative agency. This non-transferable jurisdiction must be maintained to preserve the great ideals of liberty against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

"Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression,

in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them."¹

Supremacy and independence of the American judiciary was the subject of a studied examination made by Chief Justice Taney in his opinion reported in full in the appendix to *Gordon v. United States*, 117 U. S. 697. That opinion is said to have been his last judicial utterance, placed in the hands of the clerk shortly before his death. There the act of Congress provided that the judgments of the Court of Claims entered against the United States should not be paid until an appropriation had been estimated by the Secretary of the Treasury and approved by Congress. The Act was held unconstitutional because it made the process of the Court of Claims, and ultimately this court in cases appealed to it, dependent on the future actions of the Secretary of the Treasury and Congress. After a full and learned discussion of the functions of the departments of government in which the independence of the judiciary as established by the Constitution was emphasized, the Chief Justice declared, at page 706:

"These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial power entrusted

¹ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven 1921), pp. 92-94. See also Jefferson's *Works*, Vol. 3, p. 223, where it is said: "All the powers of government—legislative, executive, and judiciary—result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."

to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

The basic pronouncements of the strict limitation imposed upon the judiciary by the Constitution, as declared by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, cannot be overlooked; and it would be well for this court to consider again those profound principles of justice.

Daniel Webster declared: "No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole government."²

Mr. Taft, when President, on vetoing the "recall" section of the Arizona Constitution, said: "In order to maintain the rights of the minority and the individual and to preserve our constitutional balance, we must have judges with courage to decide against the majority when justice and law require."³ When Chief Justice he decreed: "... this is a government of laws and not of men."⁴

When this case was first submitted to the court the question was squarely presented: May a federal court, high or low, exercising this great judicial power entrusted to it by the people of the nation under Article III of the Constitution, by usurpation of the legislative powers through misconstruction of a criminal statute, as a *penalty* deny to a defendant in a criminal case, for having failed to obey an administrative order, the admitted defense that the order was void, illegal and in excess of the board's authority conferred by statute?

² Webster's Works, Vol. 3, p. 176.

³ Special Message to Congress, August 15, 1911.

⁴ *Truax v. Corrigan*, 257 U. S. 312, 332.

Never, before this decision, has this tyranny been sustained by any American appellate court. In petitioner's main brief it was pointed out that the inadequate judicial review thus offered, beset as it is by such a deterrent, violates Article III of the Constitution as well as the Fifth and Sixth Amendments thereto; and therefore the court was urged to construe the statute so as to avoid this result.

After the government's brief was filed it seemed necessary only to further clarify the previously taken position on these three constitutional provisions. The court has now considered those serious constitutional objections and has ruled that fundamental law was not violated in this respect.

When so concluding, the majority of the court was, we submit, in error; and for reasons stated in briefs heretofore filed the conviction should be reversed. The action of the court in throwing the weight of its authority with the forces of the government in this "battle" drove petitioner to search for heavier artillery, so to speak. That search has brought to light a new and stronger constitutional objection not previously considered by either the court or counsel, being overlooked in the pre-occupation with the other propositions involved.

Judicial Legislation Transforms Statute into an Act of Attainder

As construed and applied by the majority of this court, Section 11 of the Selective Training and Service Act, containing the criminal sanctions, is manifestly repugnant to Clause 3 in Section 9 of Article I of the Constitution, which provides: "No bill of attainder or ex post facto law shall be passed."

Many times this court has said that it must construe the federal statutes in such a manner as to remove all doubt as to their unconstitutionality. If there is reasonable doubt that a certain construction given a statute brings it into collision with the Constitution, a different construction

must be employed, if possible, so as to avoid conflict with the fundamental law of the land.

"The cardinal principle of statutory construction is to save and not destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."⁵

Thus a re-examination of this case in the light of this constitutional provision is imperative. The hideous tyranny that gave rise to the inclusion of this clause in the Constitution is well known by every student of history. The oppression, injustice and despotism those ancient "bills of attainder" inflicted on the people of three centuries ago must not now be resurrected in this time of governmental crisis to subvert the system of law the American people have fought, lived and died to preserve. Therefore the question is deserving of the most exacting judicial scrutiny.

The learned scholar Richard Wooddeson, a contemporary of that dark period in English history, in one of his series of lectures at Oxford University delivered during the term commencing in 1777, gives us a description of the tyrannical system of attainders. Those lectures are collected in the volume entitled *A Systematical View of the Laws of England*. In Lecture XLI (pp. 621-648) we read, *inter alia*:

"All of the modes of criminal prosecutions hitherto spoken of, whether by impeachment or otherwise, are vindications of the laws in being, on which they are wholly founded. But besides the regular enforcement of established laws, the annals of most countries record signal exertions of penal justice, adapted to exigencies unprovided for in the criminal code. Such acts of the supreme power are with us called *bills of attainder* which are capital sentences, and bills of pains and penalties, which inflict a milder degree of punishment."

⁵ *N. L. R. B. v. Jones & Laughlin Steel Corp'n*, 301 U. S. 1, 30.

Wooddeson proceeds to explain about the different kinds of bills of attainder and their effect. The one most like the bill of attainder found in the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 provided for a trial before the court of the King's Bench in which the questions of trial before the jury were limited to whether or not the defendant was the person named in the bill, and whether or not he failed to report at the time and place mentioned in the bill.

The similarity between the proceedings in such trials and those under the Act here challenged is striking and shocking. At pages 625 to 630 Wooddeson says:

"First as to the crime. It has been usual in times of domestic rebellion to pass acts of parliament, inflicting the penalties of attainder on those by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed. Such bills have been compared to process of outlawry at common law. But they are not to be eluded, like attainders on that process, to which many pleas and exceptions may be taken. The scope of such laws we are now considering seems to respect the crime. No alteration is made in the legal rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited be contested, these questions are to be decided by the same testimony as would be admissible on other trials. Neither is any varied modification of punishment. But a material innovation is made respecting the crime. For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed. Until that time it is inchoate, and unripe for the operation of the particular statute. . . .

"The acts of attainder, passed against domestic rebels, are enforced in a summary mode. No indictment is preferred to a grand jury; but the statute is certified into the chancery by the clerk of the parliament, in pursuance of a writ to him directed for that purpose. It is afterward re-

moved into the King's Bench; and there the whole being entered on record, the prisoner is asked what he has to allege, why execution should not be awarded against him. If a question of fact arises, as to identity of person, or a due surrender in time, a jury is summoned to meet instantly; and, as both these may be termed collateral issues (that is, not the general one, which in criminal cases is 'guilty' or 'not guilty') the prisoner on the one hand seems not to be entitled to peremptory challenges, but on the other, to have a right to the full assistance of counsel."

The striking parallelism of those English bills of attainder with the conclusions reached by the court in this case is compelling. It should be noticed that the English bills of attainder for treason were identical with the conclusion reached by this court in this case. Such English 'bills of tyranny' provided that an individual or class of individuals were guilty of the crime of treason unless they reported at a certain time and place and surrendered themselves to the mercy of the king's henchmen. If such person or persons failed to report at the time and place indicated they were "tried" and "convicted" of the crime of treason. Upon the trial the issue was confined to whether or not the accused was the person named in the bill and whether or not he failed to report at the time and place named.

In cases prosecuted under the Selective Training and Service Act of 1940, the legislative creature (i.e., each local board acting as the arm of the executive branch) reports to the Department of Justice that the exempt person was found "guilty" by the board of owing a duty for training and service under the Act and was ordered to surrender himself at a time and place fixed by the administrative agency. For this the defendant is conclusively presumed, as in the English attainder cases, to be guilty of violating the statute. Upon his so-called "trial" the issue is limited to whether or not the accused is the person named in the indictment and whether he failed to report as ordered by the 'creature of the legislature'.

Manifestly that is a modern-day, streamlined, twentieth-century *bill of attainder*! In no other way can it be better described. In the English attainder cases there was no inquiry as to whether the defendant had committed treasonable acts; and in the cases under the Act in question there is no inquiry as to whether the defendant owed a duty.

The right to prove innocence was then and is now a very substantial right.

The evil aimed at by the founders of this nation when embodying the article in the Constitution was the arbitrary and summary denial of every person's freedom to exercise the right to prove innocence in a court of justice, as such denial was practiced under the English bill of attainder.

The founders also desired to escape the insurmountable obstacle of a conclusive presumption of "guilt" that followed the bill of attainder into the court even as now a like presumption follows the order to report for induction into a district court in these United States.

Here and now, under the Act in question, the judge is given the right to fix the punishment but that does not prevent the Act's becoming the bill of attainder. The vice in the proceeding is that prior to imposition of sentence all semblances of judicial process are ignored and nullified by the rulings of the court denying the defendant's freedom to exercise his right to be heard. Although the district judge and the jury act as RUBBER STAMPS for the administrative agency that does not save the statute or the proceedings; for indeed the tribunals, in the days when attainders flourished, were similarly misused.

The fact that in 1917 Congress did not provide for criminal prosecutions in the civil courts, but left the matter of enforcement of the Act in the hands of the military authorities, does not alter the fact that in the 1940 Act (which in this respect differs from that of 1917) such enforcement, as to persons who refuse to submit themselves to the military authorities as ordered, is placed exclusively in the jurisdic-

tion of the United States District Courts. In this land there can be no justification for trial procedure contrary to that ordained by the Constitution. The duty of the courts to enforce wartime laws does not override the rights of every inhabitant of this land to be protected against denial of due process and to enjoy freedom from bills of attainder and ex post facto laws.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of attainders in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition.⁶

The evil of an act of attainder is that it transfers the determination of criminal liability of citizens out of the exclusive jurisdiction of the courts and vests in the legislature the uncontrolled prerogative to declare named individuals or designated classes of individuals to be criminal violators of certain laws and deprives the judiciary of its constitutionally assigned duty to interfere with those individuals being so declared (i.e., 'framed') through form of law and, instead, imposes upon the courts the onerous task of judicially sanctioning the travesty.

Under this arrangement it is small wonder that the jury in the trial court found that the only "issue" they were to "decide" was obvious, being openly admitted by everyone in the courtroom before the jury retired to "consider" the evidence!

It is submitted that Nick Falbo was the victim of this act

⁶ See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

⁷ "It is emphatically the province and duty of the judicial department to say what the law is." MARSHALL, C. J., *Marbury v. Madison*, 1 Cranch 137.

of attainder, in which his guilt was conclusively predetermined by the draft board when acting as the executive agent of the legislature, and that now he languishes in prison under a heavy criminal penalty without ever having been found guilty in a court of justice of violation of any law—except the act of attainder, which in truth and in fact is not a law under the United States Constitution.

Closer consideration of the operation of the Act as construed in the majority opinion further reveals the true identity of its criminal sanctions section as an act of attainder:

The definition of crimes and the fixing of appropriate penalties is, of course, a proper legislative function. But when the legislature (or the executive authority) undertakes to promulgate a device whereby any specified individual or class of individuals can be *arbitrarily and summarily* declared guilty of violation of such law, then that law plainly is a bill of attainder. This peculiar characteristic makes such laws easily identifiable.

In the past "expurgatory oaths", so called, have been a favorite means of identifying the guilty class. Those unable or unwilling to subscribe to the oath were arbitrarily and summarily declared guilty without the benefit or protection of judicial review.

This courts construction and application of the Act in this case to justify petitioner's "conviction" as a violator revives and sanctifies that ancient "expurgatory oath" technique. Those unable or unwilling to subscribe to the 'oath' are arbitrarily and summarily presumed and declared to be guilty of a violation of their lawful duty under the Act. The only crime alleged in the indictment and the sole issue to be proved on the trial is the fact that the 'oath' was not taken when ordered to be taken under the Act. If the jury finds such to be true, then the court imposes the statutory penalty.

Statutory exemption of petitioner from duty is a fact that vitally affects jurisdiction of the administrative agency.

This court has admitted that it is an issue which must be judiciously and judicially considered by the courts under the Act—but exercise of that right is denied until petitioner undergoes a certain ceremony of induction. So to condition petitioner's free exercise of that right is to place the Selective Service Act in a singular position. A defendant's right of review through judicial inquiry into *jurisdictional facts* of a controversy decided by any other administrative agency is not thus proscribed and conditioned upon compliance with some irrelevant prerequisite; hence all of such agencies' reviewable functionings are constitutionally permissible.

But by permitting a conviction upon the mere showing of a failure to respond to the order to report for having administered to him the oath of induction the exempt person is pronounced guilty without any of the formal judicial safeguards ordinarily allowed in criminal proceedings, in exactly the same manner as judges in England proceeded under bills of attainder. If a law permits the legislature or the administrative agency to make a conclusive determination as to essential facts of guilt, namely, (1) the duty for service and (2) exempt status under the Act, it is the same as being pronounced guilty in a legislative decree which is merely handed to the judiciary for execution, all of which is precisely in the fashion of English bills of attainder.

Thus it is again manifest that respective functions constitutionally prescribed for the present American Government's judicial, executive and legislative branches are wrongly intertwined, perverted and confused in a manner wholly un-American—pernicious and foreign to the orderly practice conceived and defined for each of the three branches by the framers of the Constitution. In such distorted setting the legislature is, as it were, put on a pedestal as "sovereign", the executive and judicial branches becoming its puppets, while the sovereign people play the role of serfs of the "sovereign" Legislature!

In the instant case, the construction given the Act makes the rules of reasonable doubt, presumption of innocence,

etc., impotent and void, and entirely denies the real function of the jury to determine the facts of guilt of the defendant. Thus the Act deprives a certain class of citizens of their liberty without any of the judicial safeguards provided for the security of this land's every inhabitant in the courts; and it is, therefore, an act of attainder as harsh and cruel as those administered by the English despots of the 17th century.

As construed and applied by this court, the Act conclusively presumes the innocent and exempt defendant to be a felon unless he takes the 'expurgatory oath' through subjecting himself to the ceremony of induction. Then and only then—*after* obeying the command thus to subject himself—does he become endowed with the right to speak in his defense! Obviously this is a pernicious and wholly alien fallacy.

Both the Congress and this court should know that to allow an exempt minister or a deferred conscientious objector the right to judicial review only upon taking of an oath that violates his conscience is tantamount to imposing pains and penalties prohibited by the bill of attainder clause. It should be remembered that the law here does not provide for automatic induction into the armed forces after a certain time as did the 1917 Act. This was intentionally avoided by Congress. The induction act is contemplated as a voluntary act on the part of the individual. Thus to force one to unwillingly submit to induction as a condition to judicial review is nothing short of the tyrannical bill of attainder.

By construing the Act as it has, this court sanctioned a legislative method of exercising criminal jurisdiction against a class of persons who are exempt and have no duty under the Act. The court has dispensed with the ordinary judicial forms and rules for the trial of one by indictment before a jury. The action of the court is the same as denying all of the affirmative defenses in murder and rape cases because the defendants "flouted the law", and providing that review would have been permitted by habeas corpus if the

defendant had pleaded guilty or *nolo contendere*. For trial of indictments under the Act the court has done away with all the ordinary forms of legal precedents governing trials in criminal cases. Because of the contempt of the draft boards and failure of petitioner to obey the order, the court has taken away whatever advantages naturally accrue to petitioner under the highly protective system of law in the trial of criminal cases. By barring any judicial inquiry as to duty of an exempt person under the Act the court has approved the "star chamber" conviction of petitioner without any evidence of guilt or breach of duty being produced in court against him. Astonishing as it may seem, the court has solemnly decreed that the Federal judiciary cannot judicially recognize an accused citizen brought before it as entitled to the rights of a trial unless such person shows that he has taken what in effect becomes an "expurgatory oath" of induction and appears before the bar garbed formally as a ceremonially inducted national servant.

Before discussing cases it seems appropriate to consider further the historical background of such tyrannical laws. *The Catholic Encyclopedia*^s inter alia states: "A Bill of Attainder may be defined to be an Act of Parliament for putting a man to death or for otherwise punishing him without trial in the usual form. Thus by a legislative act a man is put in the same position as if he had been convicted after a regular trial. . . . In the popular sense, however, the term 'Bill of Attainder' embraces both classes of acts, and in that sense it is evidently used in the Constitution of the United States, as the Supreme Court has declared in *Fletcher v. Peck*, 6 Cranch 138, that 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both'. Such a bill deals with the merits of a particular case and inflicts penalties, more or less severe *ex post facto*, without trial in the usual form. While bills of attainder were used in England as early as 1321 in the procedure employed

^s Vol. II, p. 59.

by Parliament in the banishment of the two Despensers (1 St. tr. pp. 23, 38), it was not until the period of passion engendered by the civil war that the summary power of Parliament to punish criminals by statute was for the first time perverted and abused."

Says the *Encyclopædia Britannica*:⁹ "*Bills of Attainder*, in English legal procedure, were formerly a parliamentary method of exercising judicial authority. They were ordinarily initiated in the House of Lords and the proceedings were the same as on other bills, but the parties against whom they were brought might appear by counsel and produce witnesses in both Houses. . . . First passed in 1459, such bills were employed, more particularly during the reigns of the Tudor kings, as a species of extrajudicial procedure, for the direct punishment of political offences. Dispensing with the ordinary judicial forms and precedents, they took away from the accused whatever advantages he might have gained in the courts of law; such evidence only was admitted as might be necessary to secure conviction; indeed, in many cases bills of attainder were passed without any evidence being produced at all. In the reign of Henry VIII they were much used, through a subservient parliament, to punish those who had incurred the king's displeasure; many distinguished victims who could not have been charged with any offence under the existing laws being by this means disposed of."

Judge Cooley¹⁰ said: "A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime. . . . Every one must concede

⁹ Vol. 2 (1942 ed.), p. 656.

¹⁰ *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode. And although it would be conceded that, if such bills were allowable, they should properly be presented only for offenses against the general laws of the land, and be proceeded with on the same full opportunity for investigation and defense which is afforded in the courts of the common law, yet it was remembered that in practice they were often resorted to because an obnoxious person was not subject to punishment under the general law, or because, in proceeding against him by this mode, some rule of the common law requiring a particular species or degree of evidence might be evaded, and a conviction secured on proofs that a jury would not be suffered to accept as overcoming the legal presumption of innocence. Whether the accused should necessarily be served with process; what degree or species of evidence should be required; whether the rules of law should be followed, either in determining what constituted a crime, or in dealing with the accused after conviction,—were all questions which would necessarily address themselves to the legislative discretion and sense of justice; and the very qualities which are essential in a court to protect individuals on trial before them against popular clamor, or the hate of those in power, were precisely those which were likely to prove weak or wanting in the legislative body at such a time. And what could be more obnoxious in a free government than the exercise of such a power by a popular body, controlled by a mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?

"Nor were legislative punishments of this severe character the only ones known to parliamentary history; there were others . . . called bills of pains and penalties . . . ; and the term 'bill of attainder' is used in a generic sense, which would include bills of pains and penalties also. . . .

"The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere. Nevertheless, cases have recently arisen, growing out of the attempt to break up and destroy the government of the United States, in which the Supreme Court of the United States has adjudged certain action of Congress to be in violation of this provision and consequently void."

Judge Story¹¹ says: "In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of a trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears or unfounded suspicions. . . . The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of vio-

¹¹ *Commentaries on the Constitution of the United States* (Bigelew, 1891), Vol. 2, p. 216, s. 1344.

lent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."

It cannot be argued that because the *locus in quo* of the proceedings were in the judicial arena or a place called a court, such fact would prevent the act from being such an unconstitutional law. The presence of a judge, disrobed of his judicial powers, and the attendance of a jury, subservient to the court's charge that they cannot inquire into the innocence of the defendant, does not take the law, as construed, out of the condemnation pronounced by the writers of the Constitution speaking for the people of these United States. The usual instruments of justice may easily become the instruments and agency of a tyrannical legislature in such proceedings, as is clearly demonstrated in the record of this case. All judicial powers and institutions of justice were literally thrown to the winds to accomplish the demands of expediency.

This court has had previous occasion to examine the unconstitutionality of bills of attainder. The most famous case is that of *Cummings v. Missouri*.¹² Cummings, a Roman Catholic priest, was prosecuted under provisions of the Missouri Constitution making it mandatory for all preachers, priests and ministers to subscribe to an oath regarding their past affiliation with the Confederacy. Cummings refused to take the oath and he was prosecuted and finally forced to appeal to this court. The fact that the bill of attainder proceedings against him under the state constitution and statutes were instituted and prosecuted in a Missouri court did not prevent nullification of the conviction because of its repugnancy to the Federal Constitution prohibiting states from passing bills of attainder. This court¹³ said: "We do not agree with the counsel of Missouri that to punish one is to deprive him of life, liberty, or property,

¹² 4 Wall. 277.

¹³ 4 Wall. 320-332.

and that to take from him anything less than these is no punishment at all.' . . . The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. . . .

"Some punishments," says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation or forfeiture of lands or both, or of the profits of land for life; others induce a disability of holding offices or employments, being heirs, executors and the like.'

" . . . Any deprivation or suspension of any of these rights for past conduct is punishment, and can in no other-wise be defined. . . .

"It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher v. Peck*, 6 Cranch 137, Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . . .'

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge. It assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, with-

out any of the formal safeguards of trial; it determines the sufficiency of proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. . . .

"These bills are generally directed against individuals by name; but they may be directed against a whole class. . . . These bills may inflict punishment absolutely or may inflict it conditionally.

"The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself [reported for induction] before the said first day of February, for trial, the penalties and disabilities declared should be void and of no effect. (Printed in 6 *Howell's State Trials*, p. 391.) [Bracketed words added]

"A British Act of Parliament, to cite the language of the Supreme Court of Kentucky, 'might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it . . . (*Haines v. Buford*, 1 Dana 510)

"If the clauses of the second article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and therefore should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the

clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts [report for induction], they would be no less within the inhibition of the Constitution. [Bracketed words added]

"In all these cases it would be the legislative enactment creating the deprivation without any of the ordinary guards provided for the security of the citizen in the administration of justice by the established tribunals.

"The results which would follow from the clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to teach or preach unless the presumption be first removed by their expurgatory oath—in other words they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-makers in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition

can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

" . . . This deprivation is punishment, nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of persons would be unable to take the oath prescribed. To them there would be no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. . . .

" . . . They impose the same penalty, without the formality of a judicial trial on conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition . . . "

IN THE CASE AT BAR denial of petitioner's right to present his defense (guaranteed by due process) for declining to take the "expurgatory oath" through submitting to ceremonial induction, is absolutely indistinguishable from the denial of liberty of the priest Cummings for refusing to take the prescribed oath.

With the passing of time, *enlightened* mankind has become so far removed from the prevailing recognized use of bills of attainder in England that it is easy for modern man to meet up face to face in the middle of the road with a streamlined twentieth-century bill of attainder and be unable at once to recognize it as the type condemned by the founding fathers, especially when it is tied onto a war law.

One of the most notorious acts of attainder was that passed by Parliament in the 17th century against the Earl of Strafford (Thomas Wentworth) because of his supposed acts of treason.¹⁴ History shows that the bill of attainder

¹⁴ *Famous Trials of History*, Birkenhead (Doubleday, Doran & Co., New York, 1926), Vol. 1, pp. 33-47.

enacted by Congress (according to this court) so as to deny the right to be heard in the defense to indictments affecting many hundreds, if not thousands, of persons, is comparable to the aforesaid bill of attainder prosecuted against the Earl of Strafford. It was such an outrage committed in the name and by the authority of the King and Parliament that official efforts were made to expunge the proceedings from the record. Wooddeson¹⁵ says: "The bill of attainder was a private act, and is preserved for our inspection only perhaps by Rushworth in his account of the trial. For the reversing statute (which is placed, whether properly or not, among the public acts) ordained that all records and proceedings of parliament relating to the said attainder, should be wholly cancelled and taken off the file or otherwise defaced and obliterated, to the intent the same might not be visible in after ages, or brought into example to the prejudice of any person whatsoever."

Here it seems appropriate to suggest that should this court, on reconsidering this case, reach the conclusion that it has erroneously transformed the Act of Congress into a bill of attainder, appropriate steps be taken by the court, as author of the amendment, to expunge from its records the interpretation placed on the statute for the same reasons that compelled Parliament to repeal the highly unjust act of attainder against the Earl of Strafford. It is hoped, however, that this court does not act to correct its error as belatedly as did the Parliament, which waited until long after the death of the unfortunate earl to repeal the Act. The justice of a homely axiom is indeed apropos: "It is too late to lock the corral gate after the horse is stolen." If the court delays to correct its error until the need for a selective service act is past, the mischief of the act of attainder will have been wrought and the disgrace of this outrage inextinguishably seared into the history of the land of the free.

The Act as construed also smacks of *ex post facto* iniquity.

¹⁵ *A Systematical View of the Laws of England*, Lecture XLI, p. 633.

uity. Each draft board has been empowered by the court to conclusively deny existence of facts which show the board has no jurisdiction and, also, to find an exempt person liable for duty. Congress said in 1940, when passing the Act, that such persons have no duty. In 1943, by the construction placed on the Act, this court confers upon the boards the authority to conclusively and finally interpret the provisions of the statute for exempting ministers, Section 5 (d) of the Act. Persons thus specifically exempted are later, through arbitrary fiat by a local board, declared to be within the anathema of the criminal sanctions clause. Since such construction of the statute by the local boards is binding upon the courts, an innocent person may be punished for an act not even interdicted by a written law of Congress. Not many years ago this court¹⁶ said: "A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question."¹⁷

Constitutional Requirement of Unpenalized Judicial Review

Can it be doubted that the requirement of reporting at a given time and place for the purpose of submitting to ceremonial induction amounts to an "expurgatory" procedure that conclusively brings within the penalty of the statute a class of citizens unable or unwilling to submit thereto?

This particular mode of "expurgation", imposed by the opinion of the court, deserves brief consideration.

If the person or persons named in one of the English

¹⁶ *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 662.

¹⁷ See, also Mr. Justice Stone's statement in *Beazell v. Ohio*, 269 U. S. 163, 169.

acts of attainer surrendered themselves to the King in obedience to his command, their action was regarded as an admission of guilt and they were punished according to the King's pleasure without the need of a judicial proceeding. Exactly similar is the situation in which petitioner found himself. By reporting for induction he must *ipso facto* surrender his civilian status and civil rights. So doing, he immediately becomes amenable to military law and for infractions thereof he is punishable at the pleasure of the military tribunals without recourse to the civil courts. The fact that he may have the right to petition the civil courts for a writ of habeas corpus does not save him from being penalized by the military tribunals. If he fails to file his petition for a writ of habeas corpus or is unsuccessful upon a hearing thereof, he may be subjected to any of many military penalties, which are much more severe than those prescribed by the questioned Act,¹⁸ before he can appeal his civil case. Penalties thus incurred would thereafter prevent his release regardless of appellate disposition of the habeas corpus application.

Irreparable injury to which he is thus subjected, if forced to submit to induction as a means of testing the validity of the order, must be conceded to be greater than any inconvenience or injuries this court has held in other cases to be grounds for allowing judicial review prior to compliance with administrative process.¹⁹ In the last war there were

¹⁸ Violation of his new military obligations may subject the inductee to a sentence of death under Article 64 of the Articles of War. (Sec. 1, ch. II, Act of June 4, 1920, 41 Stat. 787) Cf. Note 21, page 29, *infra*.

¹⁹ Grave problems faced by civil and military authorities in the last war are calmly analyzed in "The Conscientious Objector" (21 Columbia U. Q'terly 253) (1919) by Harlan F. Stone; see, also, *Statement by the Third Assistant Secretary of War Concerning the Treatment of Conscientious Objectors in the Army* (1919), Government Printing Office; *The Conscientious Objector* (Boni and Liveright, New York, 1919), Walter Guest Kellogg, Major, Judge Advocate, U. S. A., chairman of the Board of Inquiry.

over 500 court-martial cases of conscientious objectors.²⁰ Records of the Office of the Judge Advocate General show that "since Pearl Harbor" the treatment of Jehovah's wit-

²⁰ The *Statement* (Note 19, supra) includes the following summary of court-martial cases of conscientious objectors, compiled to June 7, 1919 (pp. 53-54):

| | |
|-------------------------------|------------|
| Tried by courts-martial | 504 |
| Acquitted | 1 |
| Convicted and sentenced | <u>503</u> |

Disapproved:

| | |
|---|-----------|
| By reviewing authority | 3 |
| On recommendation of Judge Advocate General | <u>50</u> |

| | |
|---------------------------|------------|
| Effective sentences | <u>450</u> |
|---------------------------|------------|

ORIGINAL SENTENCES OF COURTS

| | | | |
|------------------------|-----|---------------|------------|
| Death | 17 | 2 years | 3 |
| Life | 142 | 50 " | 3 |
| 10 years | 89 | 8 " | 1 |
| 20 " | 73 | 11 " | 1 |
| 25 " | 57 | 12 " | 1 |
| 15 " | 47 | 13 " | 1 |
| 5 " | 29 | 18 " | 1 |
| 30 " | 19 | 28 " | 1 |
| 3 " | 5 | 45 " | 1 |
| 1 year | 4 | 99 " | 1 |
| 40 years | 4 | | |
| Less than 1 year | 3 | | <u>503</u> |

SENTENCES AS FINALLY EXECUTED AFTER REVIEW BY
REVIEWING AUTHORITIES AND BY JUDGE ADVOCATE GENERAL'S OFFICE

| | | | |
|------------------------|-----|--|----------|
| 25 years | 166 | 50 years | 2 |
| 10 " | 94 | 35 " | 1 |
| 15 " | 65 | 8 " | 1 |
| 20 " | 49 | 11 " | 1 |
| 5 " | 32 | 12 " | 1 |
| 30 " | 18 | 13 " | 1 |
| 3 " | 8 | 18 " | 1 |
| 1 year | 4 | 28 " | 1 |
| Less than 1 year | 2 | Sentence disapproved and accused released | 53 |
| 2 years | 2 | Sentence suspended | <u>1</u> |

503

| | |
|--|-----------|
| Sentences mitigated by reviewing authorities | 185 |
| Sentences mitigated on recommendation of Judge Ad- vocate General | <u>11</u> |

nesses and conscientious objectors inducted has been severe.²¹ To one not subject to duty of training and service imposed by the Act, the order to report for induction is the equivalent of an order banishing him from his position in society, and is, therefore, a very severe penalty, and one to which he should not be required to submit without opportunity for judicial review.

Often this court has held that the right to judicial review (claimed by the majority justices to be available to petitioner through writ of habeas corpus) is merely nominal and illusory if the affected party can appeal to the courts only at risk of undergoing penalties so great that it becomes preferable to yield to orders of uncertain legality rather than to ask for protection of the law. To refresh the memory of the court, discussion of a few of those cases follows:

The respected precedent of many years' standing was announced in *Ex parte Young*.²² The Minnesota legislature passed a law authorizing the Railroad and Warehouse Commission to fix rates which provided for the imposition of enormous penalties for violation of the regulations. The United States Circuit Court granted an injunction to the railroads restraining enforcement of the Act and Regulations as applied to plaintiffs' property because of their confiscatory nature. The state's Attorney General obtained a writ of mandamus in the state courts compelling the railroads to comply with the law. For this he was adjudged in contempt by the Circuit Court. He immediately applied to this court for a writ of habeas corpus. On the hearing he was remanded to custody of the marshal and this court held that the right of judicial review in the state courts in proceedings to collect the penalties was not sufficient to require the railroads to comply with the order or disobey it as a con-

²¹ Brutality suffered at hands of military authorities by some of Jehovah's witnesses who reported for induction has also been noticed in the public press; e.g., *Time* magazine, April 19, 1943, p. 26.

²² 209 U. S. 123.

dition to obtaining review. This court²³ said: "A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

" . . . Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. . . .

"We hold therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

Thereafter, in *Wadley Sou. Ry. Co. v. Georgia*,²⁴ this court found that the Georgia State Railway Commission was empowered by statute to treat all connecting carriers alike in regard to payment of freight in advance or on delivery and that it ordered railroads to cease demanding payment in advance. The act provided for a penalty for failure to comply with the orders. This court said: "But in what-

²³ 209 U. S. 123, at page 147.

²⁴ 235 U. S. 651, 660-663.

ever method enforced, the right to a judicial review must be substantial, adequate and safely available, but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. . . . He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

More recently, in *Okl'a. Operating Co. v. Love*, 252 U. S. 331, this court reached a similar conclusion as to an Oklahoma statute that provided for certain laundry rates. The only way that the rate order could be reviewed was by appeal from the commission to the state supreme court on conviction for contempt by the commission for disobedience to the order. In sustaining the right of judicial review prior to obedience or disobedience to the order, this court struck down the inadequate provision of the Oklahoma legislature, saying: "So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. The constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. (Article IX, ss. 18, 19) By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme

Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be \$500; and each day's continuance of the refusal after service of the order it is declared 'shall be a separate offense.' The penalty may apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co. v. Oklahoma*, decided this day, post, 339, it appears that the full penalty of \$500 with the provision for the like penalty for each subsequent day's violation of the order was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single-prescribed rate. Obviously, a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the 'insufficiency of those rates.'

On other occasions this court has held that where no adequate opportunity is afforded a person under an administrative law for a judicial review in advance of submission to or the incurring of possible penalties for disobedience of an administrative order such law is in contravention of due process of law. See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. Ry. Co. v. Nebraska*, 217 U. S. 196, 207-208.

No extensive argument is needed to show that induction for any service under the Act imposes heavy duties upon any inductee, forthwith stripping him of his civilian status and of his constitutional rights and freedoms enjoyed under civil law. Immediately upon reporting for induction he becomes subject to military law *ipso facto*, without further action on his part. Refusal or failure to take the oath does not preclude military jurisdiction from attaching. The registrant on induction takes on a new status in much the same way that his obligations change, as when he marries.

When inducted his status is so fixed and certain that it cannot be terminated at will but only according to law. He is a servant; the nation is his master. He must live a life of regimentation and is under very severe discipline. His rights as a private individual are gone. His life is imperiled by dangers of various kinds. He can make no personal choices as to life, liberty or pursuit of happiness, as civilians do. Even in civilian public service camp the inductee, as a national servant, must obey rules of conduct and regimentation very similar to those obeyed by persons subject to military authority. Infraction of the rules is punishable. Forcing one to assume such a change of status constitutes a *penalty* inflicted upon the individual when compared with his status as a civilian. Justice Brewer, dissenting, pointed out that exclusion or deportation of a citizen on the charge that he is an alien is admittedly a *penalty* because it changes his status. *United States v. Sing Tuck*, 194 U. S. 161, 179-180. Compulsion of one to undergo a change in status by appearing for induction constitutes a hardship, loss and disadvantage to the civilian; hence it is a *penalty*. To a registrant *exempt from duty* under the Act it is admittedly a severe *penalty* to require him to report for induction as a condition to obtaining judicial review. If he claims exemption upon submission to and after induction he is certain to incur severe punishment at the hands of the military authorities, which is far more severe than the punishment provided by the Act for disobedience of an order to report for induction. Once he reports for induction he cannot successfully claim that the denial of civil rights or of rights in the civil courts is a denial of due process of law. This court has held that to those in the national service the military laws and regulations, rigorous though they may be, are due process. *United States ex rel. French v. Weeks*, 259 U. S. 326; *United States ex rel. Creary v. Weeks*, 259 U. S. 336.

Constitutional Inadequacy of Judicial Review by Habeas Corpus After Induction

Habeas corpus is not an adequate remedy to protect the registrant claiming exemption under the Act. Existence of the remedy and the right to prosecute the action do not suspend military rules and practices nor the inductee's liability thereunder pending a review in the courts. As heretofore shown,²⁵ those who, like Jehovah's witnesses, claim their exemption and decline to perform the obligations of a soldier, necessarily incur liability for severe penalties and suffer stern punishment. This court's opinion in *Oklahoma Operating Co. v. Love*, 252 U.S. 331, and cases there cited, compel the conclusion that habeas corpus, beset as it is with these deterrents, is not an adequate remedy to protect the registrant's civil rights pending final determination of the questions raised. Habeas corpus procedure is a civil action which must be brought at the expense of the petitioner and may prove illusory. The writ must be heard in the jurisdiction where the inductee is held and not where his local board is situated. He may be so far removed from witnesses, friends, family, lawyer and finances as to render impractical successful prosecution of a habeas corpus proceeding. Circumstances often are such as to make prohibitive the instituting of an action for a writ. Especially is this true if the inductee is transported to a foreign shore beyond reach of the judicial process of the United States courts. This might easily result in many, if not all, cases. While trying to marshal his assets, friends, kin and counsel to institute the proceeding he might easily be transferred to a camp in another jurisdiction or entirely removed from the country.

Habeas corpus is not an administrative remedy but is a judicial process and forms no part of the administrative scheme envisioned by Congress. This court has uniformly held that a litigant seeking review for an administrative determination is not required to resort to some extraor-

²⁵ Notes 19, 20 and 21, pages 27-29, supra.

dinary method of judicial process, such as habeas corpus, as a condition precedent to enjoyment of other existing methods of obtaining judicial review. This court also has held that judicial remedies need not be exhausted before applying to federal courts for relief. *Lane v. Wilson*, 307 U. S. 268; *Railr'd & W. Comm'n of Minn. v. Duluth St. R. Co.*, 273 U. S. 625. The judicial maxim of exhaustion of administrative remedies is confined to *administrative* remedies provided under the Act. Petitioner was therefore under no obligation to report for induction and then apply for another judicial remedy. The Act does not require it, and certainly no rule of judicial construction authorizes it. He *could* have reported for induction and applied for a writ of habeas corpus, but the law did not require him to do so. The general law of the land provided for two methods of bringing him before the courts or two remedies to obtain judicial review; and the law does not compel him to choose either remedy, and he certainly need not choose the weaker, habeas corpus, and incur the risk of great penalties and dangers.

The further steps to be taken at the induction station do not contemplate a hearing or an opportunity to have the registrant's claim for *exemption* from training and service passed upon. Before the rule requiring exhaustion of administrative process can be applied, the remaining steps must be remedies that enable the registrant to obtain protection of his claim for exemption from duty under the Act. If available steps merely serve to execute and satisfy the administrative process and will not safeguard the aggrieved, then such are not administrative remedies of the kind which must be exhausted as a condition precedent to judicial review. Admittedly, therefore, the administrative step of reporting for induction offers no chance of relief, and hence does not accord with requirements of procedural due process. Resort to such a "remedy" would be hollow formalism, futile; and need not be exhausted as a condition of judicial review. *Utley v. St. Petersburg*, 292 U. S. 106. Since the "remedy" does not contemplate a hearing on the claim for

exemption from duty it cannot be regarded as one that needs to be exhausted as a prerequisite to judicial review. *Kansas City Sou. R. Co. v. Ogden Levee Dist.* (CCA 8th), 15 F. 2d 637.

Furthermore, petitioner was not obliged to exhaust the so-called remedy declared by this court to exist through reporting for induction, because under law petitioner was a *minister of religion* exempt from all training and service and therefore not subject to induction and not under duty imposed by the Act. This court has held that where one is not subject to an act creating administrative remedies he is not required to exhaust the administrative remedy. In *Gonzales v. Williams*, 192 U. S. 1, the Act provided that an alien erroneously denied entry into the United States by the ruling of the Commissioner of Immigration could appeal to the Superintendent of Immigration and thence to the Secretary of the Treasury for relief. It was held that one claiming to be a citizen and not subject to the Act did not have to exhaust these administrative remedies. This court said: "And in the present case, as *Gonzales* did not come within the Act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and *she was not obliged to resort to the Superintendent or the Secretary.*" (Italics added) In *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, it was contended that an agency had exceeded its statutory authority and that the order was void for that reason. It was held that the courts had jurisdiction of a suit to enjoin enforcement of such an order, even though plaintiff had not attempted to secure redress in a proceeding before the agency.

The criterion for ascertaining when an administrative remedy has been exhausted is whether the highest administrative or other body of legislative character empowered to act on the classification of the registrant has done so. The appeal board had denied petitioner's claim for exemption. The State and National Directors had refused to exercise their discretion. The unconditional order to report for in-

duction was the last order. It was the execution process issued by the board to enforce the determination of the highest authority within the administrative scheme. Nothing remained for petitioner to do to obtain the exemption allowed him by the law. It was the last order and terminated the proceedings of the system. The military or camp authorities have charge of the induction station, and not the Selective Service System. There the Armed Forces or the Camp Operators take over the registrant. If he disobeys the order he is taken into custody by the Department of Justice. There was no chance for the petitioner to be rejected at the induction center because he had been previously given a physical examination pursuant to the Regulations.

Reporting for induction is not in every case the last step in the selective service process. That is particularly so in the case of a minister. Under the Act he is required only to register. Congress did not contemplate that a minister should report for induction. The rule of exhaustion of administrative remedies does not apply to one who is not subject to nor under any duty for service under the Act.²⁶ Certainly Congress did not intend that one exempt and not subject to the Act should incur penalties, and forfeit not only his exempt status under the Act but also surrender his civilian status as conditions to obtaining judicial review of the classification illegally given him by the local board.

The order to report is comparable to the judgment of a court.²⁷ To compel the exempt registrant to submit to an order to report for induction is identical to the condemned practice of forcing a defendant named in a void judgment to comply with it as a condition precedent to attacking it. Such a requirement violates the due process clause and subjects the aggrieved one to the pains and penalties of irreparable injury. This court has uniformly followed the

²⁶ *Gonzales v. Williams*, 192 U. S. 1.

²⁷ *Chicago, R. I. & P. R. Co. v. United States*, 284 U. S. 80; *Carolina Aluminum Co. v. Federal Power Comm'n* (CCA 4th) 97 F. 2d 435.

practice of permitting stays of administrative orders pending a review thereof in the courts. To compel one to submit to the requirements of an administrative order makes void the purpose of judicial review.

Constitutional Requirements as to Statutory Construction Allowing Usual Criminal Defenses

It is the duty of this court to give to the statute a reasonable construction. It is a rule of long standing, established by this court, that all reasonable doubts concerning the meaning of a statute should operate in favor of the rights of the defendant. In *Harrison v. Vose*, 50 U. S. 372, at page 378, this court said: "In the construction of a penal statute it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. In *United States v. Shackford*, 5 Mason 445, Justice Story says: 'It would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet for penalties' (p. 450)." Also, in *United States v. Kirby*, 7 Wall. 482, at pages 486-487, the court observed: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."²⁸

The court is not authorized to extend a statute beyond the plain meaning of its terms.²⁹ In this case the court has

²⁸ *Sorrells v. United States*, 287 U. S. 430, 446; *United States v. American Trucking Ass'n*, 310 U. S. 534; *Helvering v. Hammel*, 311 U. S. 504, 510; *Ozawa v. United States*, 260 U. S. 178, 194.

²⁹ *United States v. Morris*, 39 U. S. 464, 14 Pet. 464; *Pierce v. United States*, 314 U. S. 306, 311-312.

certainly read into the statute something that does not exist, thus perverting the manifest intent of Congress. It is certainly no justice, or the majority justices are capable of performing the extraordinary act of reading the mind of all members of Congress and of finding that the law-makers contemplated habeas corpus as an adequate administrative remedy so as to justify denial of a defense to criminal prosecutions under the Act, when the Act itself is absolutely silent on the matter!

In absence of an explicit command in a statute the court is not authorized to deny to one prosecuted under the act the right to be heard in his defense which is in every criminal case a part of due process of law. In *Dismuke v. United States*, 297 U. S. 167, at page 172, Mr. Justice Stone, for the court, said: "But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States v. Laughlin*, 249 U. S. 440, 443."

This court has not given the statute a reasonable construction and has strained absence of explicit commands to a breaking point and distorted the language of Congress used in the Act so as to accomplish unreasonable results. It must be conceded that the denial of a right to be heard is oppressive. Often this court has observed that statutes broadly drawn can be used as tools of oppression and to avoid such results a strict construction should be placed thereon to avoid a tendency to infringe the rights of the people.³⁰

A construction of the language of the Act should be adopted that permits a defense to the indictment. This conclusion is inescapable because to give it the construction placed upon it by the majority makes it unconstitutional.

³⁰ *Bank of Columbia v. Okely*, 4 Wheat. 235; *United States v. St. Paul M. & R. Co.*, 247 U. S. 310, 313; *Helvering v. Hammel*, 311 U. S. 504, 510.

This court has said that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."³¹

The construction placed upon the statute by the court raises not only grave questions but a "succession of constitutional doubts", as suggested in *Harriman v. Interstate Com. Comm'n*, 211 U. S. 407, 422. See, also, *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546.

This court has violated the cardinal rule of judicial construction of statutes, by amending the statute or reading into it something not intended by Congress. The conclusion reached is subversive of the statement of the court in *Fasulo v. United States*, 272 U. S. 620, 629: "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

Again, in *United States v. Chase*, 135 U. S. 255, 261: "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

In the case at bar the court admits that in the Act there is nothing stated that denies the right to make a defense to the indictment and that there is in it nothing that requires a registrant to report for induction. But, in spite of an absence of ambiguity or conflict in the language, this court

³¹ *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408; see, also, *Crowell v. Benson*, 285 U. S. 22, 62; *Wright v. Vinton Branch of Mt. Trust Bank of Roanoke*, 300 U. S. 440; *United States v. Jin Fuey Moy*, 241 U. S. 394, 401; *Missouri Pac. Ry. v. Boone*, 270 U. S. 466; *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30.

illegally performed the *legislative* duties delegated by the people to Congress by amending the Act through "judicial legislation", thus entrenching upon the legislative power.

The argument of the majority opinion not only is contrary to fundamental concept of due process of law, but is also contrary to the spirit of this court's words expressed in *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195, to wit: "Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of essential rights of property." Yet the court in this case is oblivious to the plain denial of the right of the defendant exempt from duty and innocent of crime. The apathy of the court to the fundamental issue involved and the voluntary restraint that the court has placed about itself to avoid passing on the questions presented here is astonishing and surprising.

The court has grafted onto the criminal law of the land a new theory which is alien and subversive of due process and has resurrected the ancient bill of attainder, pains and penalties laws of the Middle Ages, by the factitious assumption that the failure on the part of Congress to provide for defenses in the Act or to name the defenses available to the indictment imputes an intention on the part of Congress to deny defenses to the indictment. It should be noted that Congress seldom, if ever, states what evidence is admissible in proof of an offense or in defense thereto, and rarely, if at all, prescribes the defenses that might be made to an indictment. Common sense, reason and justice possessed

by all men who favor fair play and abhor oppression and tyranny dictate that due process of law of the land of liberty admits all reasonable defenses to every offense defined in the statutes.

Does not the "absence of any provision" for a defense to an indictment simply mean, as it does in all other crimes, that Congress in the Act itself defined a crime and thereby cast the matter of defenses thereto under the law of the land into the lap of the judiciary to be dealt with as all other crime is dealt with under the general criminal procedure of the courts? 18 U. S. C., s. 452 defines the offense of murder and fixes the punishment. Nowhere therein does the statute mention self-defense or accidental killing as defenses. 18 U. S. C., s. 466 defines larceny but does not mention the defense of defendant's ownership. 18 U. S. C., s. 457 defines rape: "Whoever shall commit the crime of rape shall suffer death." Nowhere therein does Congress provide for the defense of consent. "Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made." BLACK, J., for the majority in the case at bar. Thus to contend that the foregoing fundamental defenses to the offenses of murder, theft and rape are not available because not specifically provided by Congress would immediately be labeled by any judge and by the most inexpert lawyer as *nonsense* and without merit and contrary to the fundamental concept of due process in criminal trial, which, if permitted, would effectively sabotage criminal jurisprudence.

If Congress has not provided in the statute defining the crime what the rules of procedure or evidence shall be in prosecutions thereunder in the federal courts, upon what, then, must the judiciary depend? Surely there must be some rules to guide the courts in such instances, making it unnecessary for them to conjecture as to what Congress had in mind. The rule which has been adopted in this country

was the subject of a learned discussion by Chief Justice Taney in *United States v. Reid*, 12 How. (53 U.S.) 361, 363-365: "The Judiciary Act of 1787 provides for the manner of summoning jurors. . . . The Crimes Act . . . makes some further regulations. . . . But neither of these acts makes any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted nor the testimony by which the guilt or innocence of the parties is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon the subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. . . . And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed those acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts."

In the instant case the opinion observes: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." Even if this were the 'narrow issue'—and it is difficult to understand how it could be thought to be such—nevertheless, the court's conclusions on this issue are contrary to the criminal procedure followed in this country. Heretofore, when the statutes were silent on the process of the criminal trial, the court fell back on what might be termed "American common law", as indicated in the *Reid* case, *supra*. While it is true that the

court is at liberty to modify these rules of common law from time to time to meet the needs of the day and effect justice, nevertheless, in absence of some showing that the common-law rule is "antiquated" or "outmoded", the court will follow the established practice. *Funk v. United States*, 265 U. S. 371, 381.

Has it now been found by the court that a trial by jury in open court on a charge involving a serious felony is too cumbersome and slow to meet the demands of today? Has the judiciary become so rushed and impatient that it cannot take time to hear a citizen's defense to an indictment charging him with a detestable crime?

The answer has not been left to the discretion of the judiciary. By the Fifth and Sixth Amendments the people have secured to themselves inviolate the right to a trial by jury, to be confronted with the witnesses against them, to have compulsory process for the witnesses in their favor and to have the aid of counsel in their defense. And aside from the constitutional protection of these fundamental rights, the broad principles of the American common law operate to prevent any possibility of derogation. Any doubt as to the protection afforded by the common law to these "cherished and familiar principles" disappears in the light of their background discussed by Chief Justice Taney in *United States v. Reid*, 12 How. (53 U. S.) 361, 363-364.³²

In arriving at the astonishing conclusion reached by this court concerning Section 11 of the Act, the court has entirely ignored the plain language of the Act. It provides, "Any person . . . who in any manner shall knowingly fail

³² The common-law rule of evidence is by operation of statute (28 U. S. C. 635) applicable to all common law actions in federal courts, unless otherwise provided by statute. Furthermore, according to the Final Report of the Advisory Committee on Rules of Criminal Procedure, November 1943, Rule 28 of the new *Federal Rules of Criminal Procedure* makes a similar provision.

or neglect to perform any duty required of him under or in the execution of this Act . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment." The plain requisite of guilt under the act is duty for training and service. If a person is under age of duty or exempt therefrom by Congress, he has no duty under the Act and manifestly he should be permitted to establish such fact as a defense to the indictment.

The aberration of the court in this case concerning the denial of the defense because of failure of Congress to explicitly provide for same might lead much further than the inequitable result in this instance. If the court consistently applied the new theory advanced by it, the rules of presumption, of innocence, burden of proof, and proof of guilt beyond a reasonable doubt should have been abrogated, because of the failure of Congress to mention them in said criminal statutes. The penalty inflicted upon the petitioner for having refused to obey a void and illegal order is dangerous and may act as a boomerang thrown by this court which may fly back upon the court with greater force of injury when cases involving other persons convicted for violations of the bureaucratic fiat of the innumerable alphabetical agencies of the federal government are appealed on the ground of denial of a defense.

No reasonable person can say that Congress intended or said anything whatever to destroy the fundamental rights of the defendants charged with violation of the wartime statutes or to abridge or deny the usual defenses allowable in criminal prosecutions. Congress having failed to provide the severe penalty of denial of the right to defend the indictment, this court has no authority to impose upon the petitioner such arbitrary penalty by converting the statute (Sec. 11), through judicial construction, into a bill of attainder and a law of pains and penalties contrary to Section 9 of Article I of the United States Constitution.

To the contrary, it is plain that Congress intended, by accepting Senator Bone's amendment to the Burke-Wadsworth Act, to avoid the terrible consequences that ensued from the Selective Service Act of 1917, under which every registrant was automatically inducted into the armed forces at expiration of the time fixed for induction. From and after that hour the registrant was *ipso facto* subject to military jurisdiction and could be dealt with as a deserter and court-martialed. This court has arrogated to itself the prerogative of nullifying the Congressional desire to avoid the tragedy of the 1917 induction of conscientious objectors and others by legislating a judicial penalty against the person who refuses to report for induction and stands prosecution under the Act. Congress intended to avoid court-martial penalties of 1917. (See note 20, page 28, *infra*.) The infliction of the penalty denying a defense to the indictment will inevitably result in driving persons who have grievances and conscientious objections into the armed forces and accomplish a result similar to that of 1917 contrary to the express desire of Congress.

It is certain that if Congress intended such violent conclusion as this court imputes to it, involving as it does an abrupt and reactionary deprivation of due process of law, Senator Bone, in his amendment to the criminal sanctions clause conferring upon the United States District Courts exclusive jurisdiction for offenses prior to induction, would have stated expressly that it was intended to deny the right to a full hearing in defense to the indictment. The conference report of both houses of Congress on the Bone amendment clearly implied that Congress contemplated a judicial trial in the District Court when it reported: "The Senate bill provided that persons subject to the bill who fail to report for duty as ordered should be tried exclusively in the District Courts of the United States and not by military or naval court-martial, unless such persons had actually

been inducted for the training and service prescribed in the bill." ³³

Any regulation or implication of this court which is contrary to the plain intent of Congress and the Constitution is not valid. In Section 5 (d) of the Act Congress provided that ministers of religion shall be exempt from duty of training and service under the Act, and provided that all required of them is to register. It is unreasonable that Congress would make an exemption and provide no way to protect the exemption. It is preposterous for the court to impute to Congress the intent of saying that exempt persons should report for duty and comply with void orders before they could assert their rights under the Act. It may rightly be said that Congress intended that persons subject to the statute having a duty for training and service thereunder were intended to comply with the order to report before attempting a review of their classifications in court; but it is utterly unreasonable, and amounts to an infliction of pains and penalties, to hold that a person under no duty for training and service should surrender his civilian status, subject himself to rigorous military discipline and possible punishment as a condition precedent to attacking the void order issued against him by the board.

As to petitioner, this court has indulged in a violent presumption of duty for training and service under the Act; and also has denied him his right to show that he was exempt and under no duty. Surely Congress did not intend that the draft boards should be the Supreme Law of the Land and each one the Supreme Court to determine all questions under the Act. Manifestly, Congress did not intend that such boards have the arbitrary and supreme power conferred upon them by this court to order all the judges, all members of Congress, governors of the 48 states, all members of all state legislatures, and all clergymen and ministers of religion in the land to report for induction,

³³ See petitioner's main brief, page 46.

without permitting them the right to show their exemption from duty under the Act, thus striking a killing blow to the backbone of the *home front* and demoralizing the entire war effort.

It may be objected: 'Nonsense, Congress did not anticipate such a thing, and when such occasion arises we can deal with it appropriately.' But the question is not whether the draft boards *will* do such a thing. It is whether under the ruling of this court they *can*. If they can do this under the *carte blanche* authority conferred upon them by the court, then the boards possess an unconstitutional power, contrary to the express intent of Congress.

This court has placed the position of the administrative agency above the position and dignity of the courts, holding that one who dares to transgress the 'sacred' decrees of wartime administrative agencies is guilty of such supreme contempt of their judicial powers that the highest court of the land will not grant judicial relief from their commitments for contempt until the unfortunate individuals, not subject to the jurisdiction of such agencies, have purged themselves of such contempt by compliance with the illegal orders of said boards. This places more dignity on the process of the administrative agency than that of a constitutional court. Heretofore this court has held that one committed for contempt of court for violating an injunction issued against him and from which he had not appealed could obtain relief and release by writ of habeas corpus, despite his defiance of the court, if it is shown that the committing tribunal did not have jurisdiction to issue the injunction.³⁴

Regardless of whether the order to report is considered an interlocutory step in the integrating process of induction when the criminal sanction of the Act is invoked by proceedings in the district court based on the order, it

³⁴ *In re Burrus*, 136 U. S. 586. See, also, *Ex parte Fisk*, 113 U. S. 713, 718, and *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16, where similar conclusions were reached.

became so severed from the administrative process as to make it final and permit a full inquiry on all questions affecting the validity of the order upon which the indictment is based. This conclusion is based upon *Cobbledick v. United States*, 309 U. S. 323, squarely in point, where it is said: "At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." It is clear that if this type of review of contempt orders of courts is allowed, by the same token a like power is vested in the courts to review the proceedings brought to punish a person for contempt of the administrative agency.

The rule announced by this court turns upside down the rule of final judgments of courts and administrative agencies. It compels one to submit to the satisfaction or execution of such orders and judgments prior to obtaining relief. This is contrary to all precedent, reason and justice. The rule of "non-interference" with interlocutory orders of administrative agencies applied by this court in civil cases does not control here. In those cases a final hearing was contemplated and a final order to follow. Here all hearings have been completed and the order entered is final. It is highly inconsistent to hold that one exempt from the Act must either submit to the illegal order or else be penalized by denial of his defenses upon a trial of an indictment charging him with violation of the illegal order. The holding discriminates between those persons who comply with the illegal orders and those who choose to claim their legal rights under the Act and challenge the unlawful order, thus denying "equal justice under law".

In discussion of a statute fixing rates of a railway this court implied that a railroad which defied the legislative mandate would have the right to assert the unreasonable-

ness and illegality of the rates in defense to actions brought to recover the penalty for failure to comply therewith.³⁵

The court has heretofore condemned action very similar to that approved in this case and refused to construe a statute so as to permit such results, in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 351-352, saying: "Despite the broad language of s. 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law': *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Blodgett v. Holden*, 275 U. S. 142, 148. When the Congress requires the claimant, 'who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, *the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled.*" (Italics added)

This court has repeatedly held that the failure of Congress to provide for judicial review of administrative orders in the Act creating the agency does not preclude judicial review as and when the district courts otherwise acquire jurisdiction of the controversy. In *Dayton Goose Creek Ry. Co. v. United States*, 263 U. S. 456, at page 486, the Chief Justice said: "No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for

³⁵ *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649, 666, where it is said: "... and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

such an inquiry exists under . . . the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution."

Disregarding similar arguments made against judicial review, this court in *Federal Radio Comm'n v. Nelson Bros. Bond & M. Co.*, 289 U. S. 266, 278, said: "If the questions of law thus presented were brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that fact is not altered by the mere fact that remedy is afforded by appeal. . . . We must not be misled by a name, but look to the substance and intent of the proceeding'. *United States v. Ritchie*, 17 Howard 525, 534; *Stephens v. Cherokee Nation*, 174 U. S. 445, 479."

This court has held that the action of the administrative agency can be reviewed under the general judicial powers of the federal courts if a justiciable controversy is made out in the district court even though there is no provision in the statute for review of the order. Such reviews are commonly permitted by the court despite the provisions of the Urgent Deficiencies Act, the National Labor Relations Act, the Bituminous Coal Act of 1937, and other such agencies.³⁶

Judicial review has been held to be vitally necessary, regardless of failure of the legislature to provide for it, and even in cases where the legislature has denied a review by the courts. This is because due process of law guaranteed by the Constitution makes it mandatory. This court has many times struck down state statutes as unconstitutional that denied the right of judicial review of administrative action. Long ago, in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134

³⁶ See *Shannahan v. United States*, 303 U. S. 596; *United States v. Griffin*, 303 U. S. 226; *American Fed. of Labor v. N. L. R. B.*, 308 U. S. 401; *Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n*, 306 U. S. 56; *Castleton Corp. v. Sinclair*, 264 U. S. 543; *Crowell v. Benson*, 285 U. S. 22; *David L. Moss Co. v. United States*, 103 F. 2d 395.

U. S. 418, at pages 456-457, this court had under consideration the Minnesota Railroad and Warehouse Commission Act which provided that transportation rates shall be final and conclusive when fixed by the commission and that no judicial inquiry thereof was permitted. Following the statute, the trial court excluded all evidence on the question of legality of the rates. After reviewing the construction placed on the Act by the Minnesota courts, Justice Blatchford for the court decreed: "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Again, in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, at page 289, a similar law was considered and declared unconstitutional on the same grounds. The court said: "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

"The order here involved prescribed a complete schedule

of maximum future rates and was legislative in character. . . . In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

It seems plain, in view of these established precedents; that due process of law guaranteed by the Fifth Amendment, Section 9 of Article I, and Article III of the Constitution preclude the court from reaching the opinion that Congress, in absence of plain words so stating, intended to deny a judicial inquiry as to the applicability of the statute and want of duty for training and service thereunder prior to induction.

**Rule of Non-interference with
Interlocutory Administrative Orders
Applicable only to Civil and Not Criminal Cases**

The rights and liabilities of the petitioner under the Act must be determined as of the day that he failed to report. If the law imposes criminal sanctions for his act and conduct as of that day, without providing for a judicial hearing as to his guilt or innocence, it denies to him a trial according to due process of law. In *McVeigh v. United States*, 11 Wall. 259, at page 267, Mr. Justice Swayne said: "If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Aside from the established rules of evidence, reason and common sense dictate that the trial of a criminal in-

dictment should be *de novo* and the trial court is bound to exercise its independent judgment and be guided by the ordinary rules of criminal procedure which provide for more liberal protection of petitioner's rights than do the rules of civil procedure.

The rule of non-interference with interlocutory administrative orders does not and can not apply in the trial of an indictment, and those that follow in no way affect or interfere with the administrative process or selection proceedings because the selection proceedings cannot thereafter take place under the Act, regardless of the outcome of the trial, *as the trial judge is not empowered to sentence the defendant into the armed services.* It cannot be said that the proceedings and process of the Selective Service System will thereafter be affected, because such ended completely and finally with the issuance of the order to report for induction and the failure of the petitioner to respond.

The rule of convenience for administrative agencies to complete their process so as to deny judicial interference therewith applies only in civil actions where a person subject to the jurisdiction of the agency attempts to invoke the judicial process through injunction, mandamus, etc., to stop action against the subject. It cannot have any logical or reasonable connection with the defenses that might be urged in response to an indictment in a criminal case. Certainly the issues of guilt and innocence tendered in a criminal trial by the plea of *not guilty* cannot be frittered away, especially when they have no direct connection with the completion of the selection process in raising the armed forces. To do so is to impose an illegal penalty for violation of the Act.

The criminal prosecution under the Act (Section 11) is by no stretch of the imagination a "litigious interruption" of the selective process. It is assuming a position contrary to the criminal sanctions clause itself to contend otherwise. If the prosecution of the indictment provided for in Section 11 does not interfere therewith, then of necessity the making

of a defense can have no reasonable connection with any imaginary interruption of the selection. Certainly Congress did not think so, or it would not have provided for criminal prosecution in the district courts and would have permitted the Act to remain as the Act of 1917 under which all registrants failing to report were prosecuted by court-martial for desertion. Since Congress did not provide for exclusive jurisdiction to vest with the military authority as to one failing to report for induction, it must be assumed that Congress envisioned that neither the indictment nor the making of the defense could constitute "litigious interruption" of selection and integration of manpower. Trial of the indictment is in no sense an interlocutory order. If the Constitution forbids embodying in any law denial of a defense under an indictment, then of necessity a rule of convenience to an administrative agency cannot overcome the strong provisions of the Constitution securing the fundamental right.

If in other criminal prosecutions the argument of "litigious interruption" and non-interference with the administrative agency be carried to its logical end, there would be no limit to the injury inevitably wrought thereby. The net result would be that a large percentage of innocent men would be convicted of crimes, small and great, without proof of guilt in a court of law.

In the majority opinion it is argued that there is need to deny petitioner his day in court in order to rid the administrative agency of harassing delay of the imagined litigious interruption of the integrating process. This new theory is inconsistent with the court's opinion in *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U. S. 292; 304-305.³⁷ "The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or be-

³⁷ See also *Patton v. United States*, 281 U. S. 276, 290.

cause of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In view of the fact that Congress provided exemption from all service for ministers and guaranteed a type of limited noncombatant service for conscientious objectors, it is altogether reasonable to conclude that Congress certainly did not intend that either the minister or the conscientious objector should report for induction as a condition to claiming his proper status under the Act. While Congress may have intended that persons liable for training and service under the Act should report before testing their classifications, it is certain and reasonable that Congress did not intend that persons it had specifically exempted from service should report as a condition precedent to claiming these rights under the Act. It is vain to argue that Congress intended, as a penalty, to deny the right to claim exemption from total duty for having failed to report as illegally ordered by the local board. Congress did not intend that in every case the action of the boards would be conclusively presumed to be correct and beyond judicial attack. Certainly Congress was aware that members of draft boards would be imperfect and subject to error and prejudice even as other men and that they would not be free from factional interests. It knew that the draft boards would not be so Utopian and contrary to human experience. Therefore the district courts were specifically designated to effect justice in all prosecutions under the Act, which duty necessarily requires them to weigh and decide conflicts between boards and registrants claiming exemption, in determining guilt of one charged with violation of the law. However, this court has conclusively presumed the boards to have been correct in the treatment of petitioner's claim, and thus implied that the boards were composed of perfect men free from vice and error.

Knowing the meticulous care exercised by Congress when attempting through this Act to protect the rights of conscientious objectors and ministers of religion, justice pro-

ceedings are turned into a mockery when it is said that the lawmakers intended to place an insurmountable procedural obstacle in the path of such persons exempt or deferred in the Act. One who continues to assert his right of conscience or his right of exemption as a minister against an arbitrary denial of the right by the boards is left only the choice of abandoning his conscience and his exemption and thus securing judicial review, or of following his conscience and exemption inevitably to jail.

There is absolutely no basis in reason or fact for any conclusion that there is a clear and present danger that the raising of the armed forces will be impaired or frustrated by permitting the registrant to defend to the indictment on the ground that he has no duty under the Act because exempt. There is less likelihood of any such danger through allowing this defense than there would be frustration of training program of the armed forces and camp operators under the Act by permission to test out the classification after induction. It is openly manifest that Congress intended to keep out of the forces raised under the Act for service all controversies concerning classification, and that such should be settled between the registrant and the Selective Service System in the district courts.

The number of persons eligible for exemption under the Act, including judges, legislators, governors, and ministers (including all of Jehovah's witnesses who are of draft age), comprise but a very small percentage of the population subject to the Act. There has been no rebellion from duty because of these exempting provisions. Since the exemption is provided in the law, it cannot be said by any reasonable person that the allowance by Congress of the right to show and protect one's exempt status in court would constitute a clear and present danger of a breakdown of the Selective Service System or the armed forces.

The means employed to encourage acceptance of duty as directed by the local boards by denying a defense in the courts in event of an indictment have no reasonable connec-

tion with the end to be accomplished, namely, raising an army. The doctrine could be extended to apply in all other prosecutions under the war laws so as to deny any of the usual defenses on the theory that it will discourage violations thereof. And that being established, then it could further be argued that the courts should eliminate all criminal defenses during wartime and thus suspend 'for the duration' all the institutions of liberty established by the Constitution. The price of the war is not destruction of the very things that the nation says it is fighting to preserve. Extension of the doctrine announced in this case accomplishes that very result. The connection between the Act in question and the war effort does not alter the rule that there must be a showing of a clear and present danger that integration of the armed forces for war purposes will be unreasonably impeded or destroyed by allowing the defense to a person exempt from duty to show that he is not guilty of a violation of the Act. The doctrine of clear and present danger announced by the court immediately banishes any such contention that defenses should be denied in this case. *Bridges v. California*, 314 U. S. 252. Any danger that might possibly arise from permitting this defense is so remote as to be clearly chimerical, imaginary and fantastic.³⁸

Reasoning of Wooddeson³⁹ is quite appropriate: "The defense of bills of attainder relies much on the supposition of what is rarely true, and still more rarely can be proved, as it ought, tho true, that the safety of the state essentially depends on the death of the particular offender. What traitor, when discovered, can be so formidable? what people so insecure? But if we were to agree with Cassius in his assertion, *habet aliquid ex iniquo omne magnum exemplum, quod contra fingulos utilitate publica rependitur*,' still it is exploded casuistry to support by its expediency what is allowed to be unjust."

³⁸ Full discussion of this matter is presented in petitioner's reply brief, pages 18-20.

³⁹ *A Systematical View of the Laws of England*, p. 644.

Constitutional Requirement of *De Novo* Judicial Review of "Jurisdictional Facts"

This court could have easily decided the precise question presented in this case in such a manner as to limit any such supposed dangers to a minimum by passing upon the limited and precise question of whether an exempt person can defend to an indictment; that is to say, May a district court inquire into the "jurisdictional facts" before the administrative agency? This would necessarily have eliminated the question of whether a person subject to the Act and liable for training and service and with no exemption has any defense to urge against the indictment. Thus the "danger" would have been confined to a minimum under a proper decision of this case.

The judiciary must be insensible to the many "practical" arguments asserted as justification for denial of a defense to the indictment. "It is the unique function of this Court not to dictate policy, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals." (Chief Justice Hughes on the occasion of the ceremonies in commemoration of the 150th anniversary of the first meeting of the Supreme Court, February 1, 1940.)

In refusing to consider 'practical' arguments against Jehovah's witnesses, the Florida Supreme Court declared: "These several arguments offered in behalf of the challenged ordinance are weighty and if presented to a legislative body could not only be influential but convincing, or if made on the hustings, would be approved and applauded by the people, but a court in the discharge of duty under our system is required to be oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare." *State ex rel. Wilson v. Russell*, 146 Fla. 539, 1 S. 2d 569 (1941).

The conduct of the court in this case is clearly *judicial legislation* based on its own conception of the necessities of the military machine. The court thereby disregards the sage advice of Solicitor General Francis Bacon in his essay "Of Judicature", where it is said: "Judges ought to remember that their office is *jus dicere* and not *jus dare*; to interpret law, and not make law, or give law; . . . Judges ought to be more learned than witty, more reverend than plausible [applauded], and more advised [reserved] than confident. Above all things, integrity is their portion and proper virtue."

The present refinement of criminal jurisprudence among enlightened nations has been achieved only after many sacrifices and costly struggles. The fundamental claim of defendants to certain rights in criminal trials was acquired by the people through successive battles for liberty that are chronicled throughout the pages of Anglo-Saxon and American history. Rights thus obtained have become a fundamental part of the unwritten and the written charters of liberty. Some of the leading principles of this great system of criminal jurisprudence are: (1) Presumption of innocence of all elements of the crime; (2) Right to the benefit of any doubt as to guilt; (3) Right to a prior investigation by a grand jury and prosecution by indictment in cases of felonies; (4) Trial by jury of the elements of guilt; (5) Determination of guilt based on facts and not on character or reputation; (6) Immunity of accused one to self-incrimination; (7) Right of accused to offer evidence establishing innocence; (8) Prohibition of double jeopardy; and (9) Protection against *ex post facto* laws.

These great principles of liberty and justice are contrary to the theory of trials conducted in the lands governed by the Roman law, where opposite and oppressive rules have been evolved and applied against the accused. The above common-law principles of justice stem from the maxim that it is better that 99 guilty men go free of punishment than that one innocent man be punished. For decades

these principles have been applied for protection of the people. Most of them are guaranteed by specific provisions of the state and federal *compacts*, while others are inherent rights secured in the common law.

After briefly discussing these rights, this court in *United States v. Stevenson*, 215 U. S. 190, at page 199, said: "He is entitled to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty." That the named fundamental rights are guaranteed in the due process clause against denial or curtailment by governmental agencies, as well as the courts, there is no doubt. This court, in *Ong Chang Wing v. United States*, 218 U. S. 272, 279, said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. . . . *Twining v. New Jersey*, 211 U. S. 78, and the cases therein cited."

In *Rogers v. Peck*, 199 U. S. 425, 435, this court said that the defendant must be allowed an adequate opportunity to defend himself in the prosecution.⁴⁰

In its opinion this court has decreed that it is necessary to suppress the testimony of the petitioner and to strike out all his defenses because he has been found in contempt of the administrative order. That conclusion is condemned by the court in *Hovey v. Elliott*, 167 U. S. 409, at pages 413-418, where Mr. Justice White said: "[A] more fundamental question yet remains to be determined, that is, whether a

⁴⁰ Full discussion of history of the fundamental right to be heard in all defenses to an indictment charging crime is included in petitioner's main brief. See pages 22-38, 54-58.

court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."⁴¹

When the Arizona civil code took away the remedy of

⁴¹ Read also *Lisemba v. California*, 314 U. S. 219, 236.

injunction in certain controversies between designated classes of persons this court held the same was in violation of the due process clause. *Truax v. Corrigan*, 257 U. S. 312.

In *Edwards v. United States*, 312 U. S. 473, this court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

In *Dowdell v. United States*, 221 U. S. 325, 330, the statute accomplishing results similar to the criminal sanctions clause of the Act as construed in this case was declared invalid. The court said: "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In the case at bar the reality is that the petitioner is actually convicted before the draft boards, with the courts merely imposing punishment upon *ex parte* evidence which does not have the searching light of cross examination, often hearsay, without source of it known, without confrontation of witnesses, without judicial guidance, without findings of fact to support a conclusion and judged by the unrestrained decision of the 'butcher, baker and candlestick maker' variety of persons who make up the "judicial body" of the local boards. This permits a denial of due process and converts the Bill of Rights into a *bill of no rights*. Compare *Diaz v. United States*, 223 U. S. 442.

In *Wong Wing v. United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. This court said:

"It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

In order to avoid the consequences of declaring the proceedings and the statute or regulations authorizing same invalid, the Constitution requires that there shall be available an adequate judicial review of the statutory validity of the order or judgment of the administrative agency assuming to act in the premises. In American courts no conviction can be authorized under the Constitution unless evidence is offered which tends to prove the essential elements of the crime charged. In *Tot v. United States*, 319 U. S. 463, at page 473, the court declared the Federal Firearms Act invalid, saying: "The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of the statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense."

It has previously been held that before one can be punished for disobeying an administrative order he shall have an opportunity to test its validity in court. In *Panama Refg Co. v. Ryan*, 293 U. S. 388, it is said: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." See *Brown v. Wyatt Food Stores*, 49 F. Supp. 538, 540.

When Congress provides for exemption of ministers of religion and removes them from the reach of the draft boards, how can it be said that the board's order drafting a minister for service is within that agency's statutory authority? The law dictates that the order is in excess of the jurisdiction of the administrative agency as to one exempt. *Wise v. Withers*, 3 Cranch 331.

On this question Mr. Chief Justice Stone, in *Columbia*

Broadcast'g System, Inc. v. United States, 316 U. S. 407, at page 425, said: "The ultimate test of reviewability is not to be found in an overrefined technique." The court's opinion in adopting the government's argument in this case has done just that, namely, indulged in an "overrefined technique". If the decision is permitted to stand it will place the draft boards in a position to supplant the standing law and substitute the administrative fiat as the supreme law. In *Jones v. Securities & Exchange Comm'n*, 298 U. S. 1, 23-24, it was held that an action finding no support in law or an arbitrary finding can be attacked in court by hearing. The court said: "It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official, or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the Government ceases to be one of laws and becomes an autoocracy."

It should be remembered that this court has said: "There are no constructive offenses, and before one can be punished, it must be shown that his case is plainly within the statute." (*Fasulo v. United States*, 272 U. S. 620, 629) Therefore it can be reasonably argued that it is the burden of the government to prove defendant's duty for training and service, beyond a reasonable doubt. The government cannot be relieved of that burden by relying upon a spurious presumption of validity of the order to report, because that presumption is overcome by the stronger presumption of innocence.⁴²

This court has repeatedly struck down statutes providing for rates or taxes directly, or the fixing of rates or taxes indirectly through administrative agencies, because such

⁴² *Jones on Evidence, Civil Cases*, 4th ed., Vol. 1, pp. 176-180; *Dunlop v. United States*, 165 U. S. 486; *Edwards v. United States*, 7 F. 2d 357; *Underhill's Criminal Evidence*, pp. 49-54. See also *Tot v. United States*, 319 U. S. 463.

statutes were without provision for a judicial review to protect the constitutional rights of due process and freedom from confiscation. Furthermore, the court has held unconstitutional statutes which subject the person aggrieved to possible penalties and punishments prior to judicial review. A like disposition was made of statutes which either directly or indirectly imposed such deterrent conditions as to render illusory the remedy of judicial review. It would unduly prolong this petition to quote pertinent parts of those opinions. They are listed in the margin⁴³ for convenience of the court.

In the case at bar the court argues, in effect, that there is a way open for judicial review if the objector or minister will compromise his conscience and his legal rights and submit to induction and undergo the possible penalties of military court-martial for infraction of military rules pending judicial review.

This court further says that the possibility of acquiring this expensive and uncertain judicial review adequately satisfies due process, thus permitting denial of proper defense to the indictment. This precise argument has been rejected and condemned by the court. The same sort of remedies were offered in *Oklahoma Operating Co. v. Love*, 252 U. S. 331, where the court said: "If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. . . . Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if

⁴³ *Ohio Valley Water Co. v. Ben Aron Borough*, 253 U. S. 287, 289; *Willcox v. Consul'd Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. Ry. Co. v. Nebraska*, 217 U. S. 196, 207-208; *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649, 666; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 456-458; *Wadley Sou. Ry. Co. v. Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 336-340; *Ex parte Young*, 209 U. S. 123, 147.

otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates." Cf. *Dayton Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 486.

That it is beyond the authority of a draft board to order a minister of religion to report for induction contrary to the statute is plain. If one is exempt there is a complete absence of jurisdictional facts upon which to act against the individual. All that Congress required a minister of religion to do is to register his name, address, and occupation. No further duty is required of him, and the board is precluded from taking any further action against the minister. If a board wrongfully or mistakenly orders a minister to report for induction, the order is void because Congress divested the board of jurisdiction to do so. The illegal action of the board in disregarding the exempt status of the minister does not alter his status or make him liable for training and service under the Act.

Therefore, a minister exempt from duty may defend against an indictment for failing to respond to an order to report on the grounds that the classification given, the refusal to grant the exemption and the order to report for induction are void because (1) in excess of authority of the board, (2) beyond the jurisdiction of the board, (3) contrary to law, (4) without substantial evidence to support the action taken, (5) contrary to the undisputed evidence, (6) arbitrary and capricious, and (7) deprives the person of liberty without due process of law.

The court can make an independent inquiry as to the action of the board on any of the above matters, and in deciding the questions is not bound by the findings or determinations of the administrative agency, because each of the questions involved is judicial in its nature and such are not administrative discretionary matters. On many or all of these issues the petitioner is entitled to a trial *de nova* before the district court.

The *discretionary* decision of draft boards in reference to classifications of persons under a duty for training and service pursuant to the Act and Regulations are, under decisions of this court on administrative law, final unless unsupported by substantial evidence, arbitrary and capricious or made in violation of procedural due process. However, this rule does not cover the action of the boards in reference to classifications contemplated by the statute entirely exempting and removing registrants from duty under the Act. In such cases the boards are responsible to the United States courts for a proper adherence to the statute, as much as to the classification to be given designated groups as to their personnel arrangements. The distinction is well stated in *Crowell v. Benson*, 285 U. S. 22, 63, by Chief Justice Hughes: "The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable." Accordingly, in *Wise v. Withers*, 3 Cranch 331, this court has held that if one is of that class exempted by Congress from military duty the statute commanding duty for training and service is not applicable to the exempt person and the administrative agency has no jurisdiction.

The question as to the inherent power of the administrative agency to act in respect of the subject of registrants' duty for training and service depends upon the facts before it. If the facts show that a duty exists, there is jurisdiction and power of the administrative agency to act. If the facts do not exist to show duty and establish exemption, there is no jurisdiction or power to order such registrant to report for training and service. In the field of administrative law these considerations are known as "jurisdictional facts".

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell v. Benson*, 285 U. S. 22, 54.

The distinction made in the *Crowell* case, *supra*, has been applied in a wide variety of administrative law cases. Brief discussion of a few is sufficient to demonstrate the need for application of the rule to the instant controversy.

In cases concerning validity of administrative orders deporting aliens, this court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judicial trial *de novo*. In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), this court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabauo etc. v. Etling*, 287 U. S. 329. The same rule was followed in the earlier case of *Gonzales v. Williams*, 192 U. S. 1, 15.

In *Kessler v. Strecker*, 307 U. S. 22, 34-35, it was declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho v. White*, 259 U. S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

The court ruled in the military cases that when enlistment is denied such is a denial of jurisdiction and is a jurisdictional fact for determination by the court *de novo* without limitation by the determination made by the military agency. Likewise denial of induction authority by claiming

exemption raises a question of authority of the board to act and is a jurisdictional fact to be determined by the court. *Ver Mehren v. Sirmyer*, 36 F. 2d 876, 882; *Givings v. Zerbst*, 255 U. S. 11, 20; *In re Grimley*, 137 U. S. 147. See also the 37 cases cited in note 95, page 65, petitioner's main brief. The rule was restated by Chief Justice Hughes in *Crowell v. Benson*, 285 U. S. 22, 58.

In the administration of the public land system-questions of fact are for determination of the Land Department. The determinations of that agency are conclusive. It is equally true that if lands never were public property, have been previously disposed of, or if Congress had not made provision for their sale, or exempted them for sale, the department has no jurisdiction to sell or transfer such lands. Determination in such cases is not binding on the courts, and an inquiry can be made upon a trial *de novo* in proceedings brought to attack collaterally the order of the department. *Smelting Co. v. Kemp*, 104 U. S. 636, 641; *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Borax Consolidated, Ltd. v. Los Angeles*, 296 U. S. 10; *Morton v. Nebraska*, 21 Wall. 660. Typical of the rulings in these cases is *Burfenning v. Chicago St. P. R. Co.*, 163 U. S. 322, 323, where it is said: "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof." This language is appropriately apposite to this case concerning limitation of the authority of the draft boards in dealing with ministers of religion who are exempt from duty under the Act.

In workmen's compensation cases there are certain facts which must exist before the operation of the statu-

tory scheme can begin. As to such jurisdictional facts the final arbiter is the court, not the agency. *Crowell v. Benson*, 285 U. S. 22. So also is the rule in *abandonment of line* cases concerning Interstate Commerce Commission determinations, such as whether trackage is "spur" or "industrial". In *United States v. Idaho*, 298 U. S. 105, 109-110; the court said:

"Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gagg Bros. v. United States*, 280 U. S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." This particular quotation should show conclusively the error of the district court in excluding all the evidence offered by petitioner to show proof of his ministry and exempt status under the Act. On January 3, 1944, the decision date in this case, this court approved the *Idaho* case, saying, *inter alia*: "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." *City of Yonkers v. United States*, No. 109 October Term 1943.

Under the Interstate Commerce Act and related statutes the following questions have been held to be for final determination by the courts, whose judgments are not bound by the findings of the administrative agency, that is to say, whether a party is a "person"; whether a person is a "shipper"; whether a party is a "common carrier", a "carrier by railroad", or a "carrier involved"; whether two railroads not actually contiguous are "connecting

carriers"; whether person is "intermediate carrier".⁴⁴

Even the unauthorized issuance of a patent is not conclusive upon the judgment of the court. *Doolan v. Carr*, 125 U. S. 618-625. Whether a vessel is actually "captured" is a jurisdictional fact on which the determination of the prize court is not conclusive. *Rose v. Himely*, 4 Cranch 241, 269.

Constitutional Requirement of Judicial Inquiry as to Board's Adherence to Due Process in its Administrative Functions

Assuming *arguendo* that this Court can correctly reach the conclusion that the exemption provided by Congress in this case does not convert a determination thereon by the draft boards into one on "jurisdictional facts" under the above cases, it is still contended that the courts have authority to review the draft boards' determinations because there is presented a judicial and constitutional question of whether the petitioner has been denied his rights and liberties without due process of law. No ranker violation of the due process clause can be imagined than that of illegally and arbitrarily removing all rights of citizenship from an individual, denying him his liberty and placing him in a status subject to military jurisdiction without some means of judicial review. The fact that he is liable to lose his liberty, either through induction or prosecution, presents a justiciable constitutional question under the due process clause of the Fifth Amendment. It is therefore for the courts to decide whether petitioner is threatened with loss of liberty or has been actually denied liberty without due process of law in view of the fact that he is not under duty for training and service.

⁴⁴ For the cases on these and other questions, the Court is referred to *Federal Administrative Law* (Vom Baur, 1942) Vol. 1, pp. 461-462. For a listing of the many other administrative determinations that are subject to judicial review see pp. 434-472 *op. cit.*, particularly the discussion of questions under the National Labor Relations Act, p. 465 *op. cit.*

In *Crowell v. Benson*, 285 U. S. 22, 56-57, the Chief Justice summarizes the whole matter: "It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of facts upon which the enforcement of the constitutional rights of the citizen depends. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

* Again, in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-52, the Chief Justice said: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The courts have continuously and consistently provided judicial review and protection so as to prevent the confiscation of property without due process of law by payment of a fair price or allowing fair returns.⁴⁵

Even where the courts have found no erroneous decision on a jurisdictional fact or a constitutional question, a review of the administrative determination has always been permitted where the particular finding or order affecting the substantial rights of the party is shown to be arbitrary and capricious or that in arriving at such determination the administrative agency violated procedural due process in conducting the administrative proceedings. Therefore if the Court concludes that the statute confers no extraordinary right on petitioner by providing for the exemption of ministers of religion and that the determination of his classification is similar to that of all other registrants not favored by the statutory exemption, it is nevertheless the duty of the Court to permit a review in defense to the indictment on this consideration alone.

Petitioner showed conclusively that he was a minister of religion. (R. 17-18; 52, 56, 57, 67-79) There was not one scintilla of evidence or testimony offered before either

⁴⁵ *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649; *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349; *Federal Administrative Law* (Vom Baur, 1942) Vol. 1, pp. 337-404.

the local board or the trial court that petitioner was not a minister of religion. Nor did anyone claim that he fictitiously made the claim for exemption as such. Had there been any such evidence, it would have been the duty of the boards to reduce it to writing and place it in the files.⁴⁶ There is no written report of any such evidence in the files of the local board.⁴⁷

Therefore, for the purpose of deciding this case on the undisputed evidence and record before the court it must be conclusively assumed that petitioner is a minister of religion within the meaning of section 5 (d) of the Act.

In this court's opinion it is said: "Petitioner, 25 years of age, unmarried, and apparently in good health, registered with his local board on October 16, 1940." His age, marital status and condition of health do not in any degree affect his exempt status as a minister, any more than the age, condition of health, etc., would affect the exempt status of one of the justices of this court under the Act. Even the most disingenuous person knows that a man may be a minister of religion and competent to discharge his duties as such regardless of whether he is 25 years of age, married or unmarried, and "apparently in good health". Even a *peg-legged* man can be a minister as well as an able-bodied man. These factors do not constitute adequate proof against the exempt status of petitioner or his claim under the Act.

Still assuming, for the purposes of argument only, that the decision of the local board on the question presented was one not jurisdictional or not constitutional, but one of administrative discretion, it is necessary to determine whether or not the classification, finding and order of the board was based on substantial evidence. It is found that it is not, then it is the duty of the court to acquit the defendant or at least permit a judicial review of the

⁴⁶ Reg. s. 623.2. See also Opinion No. 14, par. 6, at pp. 39a-43a of APPENDIX to petitioner's brief.

⁴⁷ Cf. Petitioner's reply brief, pp. 4-9.

question before a conviction can be entered. There must be a rational basis in evidence for the conclusions reached by the administrative agency.⁴⁸

The only court that has thus far manifested the courage to permit one indicted for failure to respond to an induction order of a draft board to show in defense that the order is illegal, has accordingly concluded that the least permissible inquiry on such a trial is whether the classification and order were made arbitrarily and capriciously.⁴⁹

It has been held that the court must examine the evidence to determine if there is substantial evidence to support the finding. *Substantial* evidence is more than a mere *scintilla*. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The first duty of the draft board under the Regulations was to examine the questionnaire submitted by petitioner to see if there was any evidence that justified placing him in some classification that would exempt him from duty under the Act. It was the affirmative duty of the local board and likewise the appeal board to place petitioner in class *IV-D* unless they could find substantial evidence that he was not a minister of religion.⁵⁰

There was not one iota of evidence that petitioner was not a minister. On the contrary, the undisputed evidence before the board showed he was a minister of religion. The finding and subsequent order of induction by the board is unsupported by substantial evidence and against the weight of the uncontradicted evidence, and therefore put petitioner under no legal obligation to respond.⁵¹

⁴⁸ *National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318; *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; *Rochester Telephone Corp. v. United States*, 307 U. S. 125. See also *Federal Administrative Law* (Vom Baur, 1942). Vol. 2, pp. 564-585.

⁴⁹ *Baxley v. United States* (CCA-4), 134 F. 2d 998; *Goff v. United States* (CCA-4), 135 F. 2d 610.

⁵⁰ Reg. s. 623.21, 627.25, 627.26. See also Lewis, "Appeal Procedure Under the Selective Service Law" (1942), 17 Ind. L. J. 273, 281-282.

⁵¹ *W. V. & M. Couch Co. v. N. L. R. B.*, 301 U. S. 142, 147; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229, 230; *Spiller v. A. T. & S. F. R. Co.*, 253 U. S. 117.

Where a commissioner of immigration ignores the question presented to him, as did the draft board here, and the evidence pertaining to it, as here, and takes away the right of hearing, the commissioner's order was held void. *White v. Chin Fong*, 253 U. S. 90.

The rule with respect to a jury verdict in judicial proceedings is substantially the same. *Ganning v. Cooley*, 281 U. S. 90.

An administrative order that is based upon a finding on an administrative question, and is not supported by substantial evidence, must be set aside by the judiciary as arbitrary and capricious and as constituting a denial of due process of law.⁵²

The finding of the agency cannot be presumed to be supported by substantial evidence, because of the presumption of innocence that dominates in criminal proceedings.

Where the hypothetical statement of facts set forth in an opinion by the head of an administrative agency, such as Opinion No. 14 of National Headquarters of Selective Service System concerning Jehovah's witnesses, is indistinguishable on the facts of the case of petitioner before the boards, and such boards reject the opinion and set up their own standards of behavior and classification, as did the boards here, the orders issued thereafter are null and void and must be set aside by the judiciary as arbitrary and capricious.⁵³

It is submitted that for draft boards "to rest their interpretation of statutes on nothing but their own conception of 'morals' and 'ethics' is, to say the least, dangerous business." (Mr. Justice Black in *The Mercoid Corporation v. Mid-Continental Investment Company*, Nos. 54 and 55, October Term, 1943.)

⁵² *United States ex rel. Vajtauer v. Commissioner*, 273 U. S. 103. See Mr. Justice Pitney's statement in *L. & N. R. Co. v. Finn*, 235 U. S. 601, 606. Cf. *R. R. Comm. of California v. Pac. Gas & Elec. Co.*, 302 U. S. 388.

⁵³ *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498.

In addition to the foregoing, there is another reason why the order of the local board should have been set aside. The board violated procedural due process provided by the Selective Service Regulations (sections 625.1 and 625.2) allowing a registrant a hearing when requested. That a hearing before the board was denied in this case is undisputed; and regardless of the subsequent proceedings before the appeal board, this defect in procedural due process was never cured. Before an appeal was taken and the time for requesting a hearing had expired, the local board had speedily and surreptitiously and contrary to the regulations delivered the petitioner's file into the hands of the appeal board, which was apparently a party to the conspiracy to give him an improper classification and deny his rights to ministerial exemption. It should be noticed that the appeal board acted speedily, promptly, and injudiciously by denying his exempt status and placing him in a classification for training and service before he had actually appealed from his classification. (R. 58) The local board chairman, on denying the request for hearing, said: "I do not have any damned use for Jehovah's witnesses." (R. 32-33).

Administrative agencies must act in accordance with the cherished judicial tradition underlying the basic concepts of fair play. See *Morgan v. United States*, 304 U. S. 1, 14-15, particularly noting page 22 where the Chief Justice said: "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority." When the *Morgan* case was before the Court previously (298 U. S. 468, 479-481), the Chief Justice said: "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." The requirements of fairness and opportunity to be heard extend to every portion of the hearing. They are not exhausted

in taking of evidence, but extend to the concluding part of the hearing.⁵⁴

Mr. Justice Rutledge's Concurring Opinion

Turning to the objection of Mr. Justice Rutledge in his concurring opinion in this case, it is observed that petitioner's exceptions to the illegal proceedings of the local board did not become moot by the action of the appeal board in affirming the original I-A classification or changing it to class IV-E. Each classification made the petitioner liable for training and service. The issue to be determined was not whether there was a change of classification; but, Was the exemption denied by each board refusing the claim for IV-D classification? The appeal board acted very much as does an appellate court. It did not hear the witnesses and receive evidence *de novo*. It reviewed the record made before the local board and ordered petitioner's claims denied in the same way that this court reviews a record and decides a case.

The affirmance of the classification by the appeal board and the refusal of the Director and the State Director to exercise discretion to change same is the same as exhausting the judicial remedies and appeals in a state court system before coming to this Court on appeal urging a federal question. When the government obtained the indictment and the petitioner pleaded 'not guilty' the issue was placed before the district court, which is analogous to bringing a federal question to this Court for decision. The fact that the appellate courts of the state did not act prejudicially or violate due process themselves does not prevent this Court from reversing a judgment on the record made in the state trial court. The same principle applies here to a review of the orders of the local board.

⁵⁴ *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 227 U. S. 88; *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U. S. 292, 304.

By this plea of 'not guilty' the petitioner attacked the order to report for induction, which is an attack against all previous proceedings of the appeal and local boards. It was not necessary to specifically name the appeal board.⁵⁵

Furthermore, the argument that no attack is made on the appeal board carries no weight, since the trial was *de novo* in the district court on judicial questions. It was not necessary to make some technical statement that petitioner was attacking the ruling of the appeal board also. Legal proceedings and rights of defendants in a criminal case, which are among the most substantial possessions of the people of this land, cannot be frittered away or denied by an "overrefined technique". The entire record of this controversy shows that petitioner was complaining because the boards did not allow to him the exemption provided by Congress. The government did not claim that it was misled in this connection. An inquiry on this serious and fundamental question cannot be denied because of an irrelevant technicality that does not affect the merits of the claim made. At any rate, this objection does not at all affect the far-reaching and fundamental constitutional questions involved.

"What is to become of constitutions of governments if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day. . . . They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders; they are to speak the same voice now and forever." (Justice Story, *Commentaries on the Constitution*, Vol. 2, p. 653)

⁵⁵ See Reply Brief of Petitioner, pp. 22-24 for additional argument on this point.

Constitutional Requirement of Trial By Jury Violated By Instructed Verdict of Guilty

There is another fundamental vice that pervades the entire proceedings in this case and which apparently has met with the approbation of this Court. The trial court in no uncertain terms instructed the jury to return a verdict of guilty against the defendant. (R. 41) This Court quoted from the charge: "If you find from the facts that he failed to report—and there is no evidence to the contrary . . . it would be your duty to find him guilty." No reasonable man can deny that this amounts to an instruction to find the defendant guilty. Such is contrary to established fundamental law of criminal jurisprudence and is reversible error regardless of whether petitioner had a legal right to question the classification. Even an obviously *guilty* person is entitled to a fair trial by jury according to due process. Merely because the court feels convinced of his guilt, there is no occasion to instruct the jury to find him so. The determination of this question is the province of the jury under the Constitution, and the court must not entrench upon their function. In thus instructing the jury the trial court abridged the constitutional right of trial by jury, contrary to Article III of the Constitution and the Fifth and Sixth Amendments.⁵⁶

See *Viereck v. United States*, 318 U. S. 236, 247-249, where it is said: "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted."

It is difficult to understand how this Court can approve

⁵⁶ *United States v. Stevenson*, 215 U. S. 190, 199; *Patton v. United States*, 281 U. S. 276; *Blair v. United States*, 241 F. 217; cert. denied 244 U. S. 655; *Cain v. United States*, 19 F. 2d 472; *United States v. Taylor*, 281 U. S. 276.

of the instruction given to the jury in this case, in view of the deep appreciation of its duty to protect due process of law in criminal cases, so eloquently expressed by Mr. Justice Black in *Chambers v. Florida*, 309 U. S. 227, 236-241: "As assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. . . . No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

The majority opinion in this case terms petitioner's efforts to secure a judicial review of the order requiring him to surrender his civilian status as a "litigious interruption of the process of selection" and conveys the impression that the question is so free from doubt that the contentions thus asserted are frivolous. The Court observes: "*Today, one year and four months after this order, he is still litigating the question.*" It seems fair to assume that the Court thus expresses its disapproval of appeals in cases of this nature because of the delay occasioned thereby. It has always been thought that the doors of appellate courts were never closed, even to the obviously guilty, if the construction of a new statute or a constitutional question is properly presented. Surely one who is innocent and is wrongfully branded guilty should have an equal chance with the guilty to escape the anathema of the court against appeals in these cases. The conclusion of the court seems to be that not only should no defense be allowed in the trial court, but also that no appeals should be taken.

Court's Decision and the War Effort

It is not the prerogative of the United States Courts to surrender any of their power or to refrain from exercising judicial functions in wartime. Although this court may have thought that it was contributing to the "all out" war effort and welfare of the nation by construing the statute so as to penalize those who fail to report for induction and thereby discouraging delinquency, the converse is true. In *Ex parte Milligan*, 2 Wall. 2, 120, Mr. Justice Miller said: "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

The greatest contribution the members of this court can make to the strength of the nation in this time of crisis is to preserve the fundamental law against any and all encroachments. To take any other course, because of the fear of a breakup or disintegration of the war effort, fear of Hitler or the fear of anything except the Constitutional mandate, inevitably leads to a trap and a disintegration of the judiciary and the balance of power between the three departments of government. "The fear of man bringeth a snare: but whoso putteth his trust in the Lord shall be safe." (Proverbs 29:25) "The fear of the Lord is the beginning of wisdom."—Psalm 111:10.

The rank fallacy of assuming that the court's construction of the statute aided the war effort is pointed out by Mr. Justice Murphy in his dissenting opinion: "To say that the availability of such a review would encourage disobedience of induction orders, or that denial of a review would have a deterrent effect, is neither demonstrable nor realistic. There is no evidence that petitioner failed to obey the local board order because of a belief that he could secure a judicial reversal of the order and thus escape the duty to defend his country. Those who seek such a review are invariably those whose conscientious or religious scruples would prevent them from reporting for induction regardless of the availability of this defense." Only concurrence of the majority justices with the correct view expressed by Mr. Justice Murphy can pay proper tribute to his judicial integrity in this case, and it is suggested that the majority align themselves with that view as was finally done with the opinion of Mr. Justice Stone in the Flag Salute case.

The constitutional *watch*, with its finely balanced works—the branches of government divided and each to a degree restrained by ties to the other branches—has been seriously injured by the *fall* of the court in this case. Such a delicately balanced instrument could easily stop functioning altogether by the unbalancing of the powers. Unless the governmental equipoise is promptly restored, the hands of time will be found to have stopped, pointing backward to the tyrannous pre-revolution era.

Conclusion

Wherefore petitioner prays that the order and judgment heretofore entered herein affirming the judgments of the courts below, be set aside and held for naught, and that on the briefs heretofore submitted, this petition for rehearing be granted and the court render an order reversing the judgment of the courts below, or, in the alternative, order the cause to be reargued orally. Petitioner prays for such other relief as he may show himself justly entitled to in the premises.

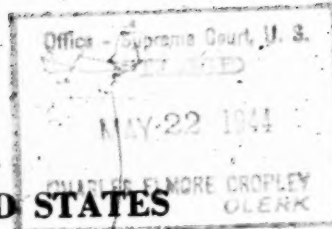
NICK FALBO, *Petitioner*
By HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

Certificate

We, the undersigned counsel for petitioner, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*



ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner's

MOTION FOR LEAVE TO FILE OUT OF TIME

**Second Petition for Rehearing
and for Recall of Mandate to Enable
this Court to Reconsider Its Judgment**

together with

SECOND PETITION FOR REHEARING

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

INDEX

SUBJECT INDEX

| | PAGE |
|---|------|
| Petitioner's <i>motion for leave to file</i> out of time his second petition for rehearing | 1 |
| Certificate of counsel | 8 |
| SECOND PETITION FOR REHEARING | 1-29 |
| Grounds | 9 |
| Discussion | 10 |
| Conclusion | 29 |
| Certificate of counsel | 29 |

CASES CITED

| | |
|--|--|
| Adkins v. Children's Hospital | 6 |
| 261 U. S. 525 | |
| Ashton v. Cameron County Dist. | 6 |
| 298 U. S. 513 | |
| Billings v. Truesdell | |
| — U. S. —, No. 215, Oct. Term 1943, decided | |
| March 27, 1944 | 1-2, 3, 4, 10, 11, 12, 13, 14, 16, 17, 18, 21, 22, 26 |
| Burnet v. Coronado Oil & Gas Co. | 6 |
| 285 U. S. 393, 406 | |
| Clayton v. United States | |
| No. —, Oct. Term 1943 | |
| Petition for writ of certiorari filed simultaneously | |
| with this petition | 28 |
| Brief supporting petition for writ of certiorari | 28 |
| Cohen, Ex parte | |
| 254 F. 711 | 20 |
| Currin v. Wallace | |
| 306 U. S. 1 | 6 |

CASES CITED

PAGE

| | |
|--|-------|
| Delaware & Hudson Co. v. Albany & Susq. R. Co. (1908) | |
| 213 U. S. 435 | 19-20 |
| Duquesne Steel Foundry Co. v. Burnet | |
| 282 U. S. 830 | 3 |
| Erie Ry. Co. v. Tompkins | |
| 304 U. S. 64 | 6 |
| Falbo, United States ex rel., v. Kennedy | |
| No. —, Oct. Term 1943 | |
| Petition for writ of certiorari filed simultaneously with this petition | 28 |
| Brief supporting petition for writ of certiorari .. | 28 |
| Falbo v. United States | |
| 320 U. S. 549, 64 S. Ct. 346 2, 3, 9, 10, 11, 13, 14, 15, 16, 17 | |
| Grieme, Herman H., v. United States | |
| No. —, Oct. Term 1943 | |
| Petition for writ of certiorari filed simultaneously with this petition | 3 |
| Helvering v. Davis | |
| 301 U. S. 619 | 6 |
| Jones v. Opelika | |
| 316 U. S. 584, 319 U. S. 103 | 3 |
| Lohrberg, United States ex rel., v. Nicholson | |
| No. —, Oct. Term 1943 | |
| Petition for writ of certiorari filed simultaneously with this petition | 28 |
| Brief supporting petition for writ of certiorari .. | 28 |
| Martin v. Struthers | |
| 318 U. S. 739 | 4 |
| Mulford v. Smith | |
| 307 U. S. 38 | 6 |
| Nat'l Lab. Rel. Bd. v. Carlisle Lumber Co. | |
| 94 F. 2d 438 | 20 |

CASES CITED

| | PAGE |
|---|------|
| Nat'l Lab. Rel. Bd. v. Sunshine Mining Co. 110 F. 2d 780 | 20 |
| Nebbia v. New York 291 U. S. 502 | 6 |
| New State Ice Co. v. Liebmann 285 U. S. 262 | 6 |
| Oil Corporation v. Bass 282 U. S. 830 | 3 |
| Paramount Publix Corp'n v. Am'n Tri-Ergon Corp'n 293 U. S. 528 | 3 |
| Passenger Cases 7 How. 283, 470 | 6 |
| Roberts Sash & Door Co. v. United States 282 U. S. 829 | 3 |
| St. Joseph Stock Yards Co. v. United States 298 U. S. 38, 94 | 6 |
| Sanitary Refrigerator Co. v. Winters 280 U. S. 30, 34, 278 U. S. 587 | 3 |
| Smith v. Allwright — U. S. —, No. 51, Oct. Term 1943, decided April 3, 1944 | 3 |

CASES CITED

| | PAGE |
|--|------|
| Steward Machine Co. v. Davis | |
| 301 U. S. 548 | 6 |
| Stull v. United States | |
| No. —, Oct. Term 1943 | |
| Petition for writ of certiorari filed simultaneously | |
| with this petition | 28 |
| Brief supporting petition for writ of certiorari .. | 28 |
| Triplett v. Lowell | |
| 296 U. S. 570 | 4 |
| United States v. Butler | |
| 297 U. S. 1 | 6 |
| Utley v. St. Petersburg | |
| 292 U. S. 106 | 19 |
| West Coast Hotel Co. v. Parrish | |
| 300 U. S. 379 | 6 |

STATUTES CITED

| | |
|---|--------|
| United States Code | |
| Title 50, Appendix secs. 301-318 ["Selective Train- | |
| ing and Service Act of 1940"] | |
| [Sec. 3 (a)] | 23, 24 |
| [Sec. 11] | 10, 20 |

SELECTIVE SERVICE REGULATIONS CITED

PAGE

Sections:

| | |
|---|------------|
| 651.1-651.8 (7 Fed. Reg. 277, Jan. 15, 1942) | 12, 27 |
| 651.1-651.10. (Part 651) | 21, 23 |
| 651.10 (a) | 12 |
| 651.21 (7 Fed. Reg. 277, Jan. 15, 1942) | 23 |
| 651.31 (7 Fed. Reg. 277, Jan. 15, 1942) | 18, 27 |
| 651.31 (a) (1) (7 Fed. Reg. 277, Jan. 15, 1942) | 14, 17, 27 |
| 652.1 | 12, 18, 23 |
| 652.1 (a) (7 Fed. Reg. 112, Jan. 6, 1942) | 17 |
| 652.1-652.14 (Part 652) (7 Fed. Reg. 111, Jan. 6, 1942) | 21, 27 |
| 652.2 | 12, 17 |
| 652.11 | 12, 17 |
| 653 | 14 |
| 653.5 (c) (6 Fed. Reg. 4663) (3 Code of Fed. Regulations, 1941 Supplement, p. 2862) | 26 |
| 653.11 (7 Fed. Reg. 248, Jan. 14, 1942) | 20 |
| 653.11 (c) (7 Fed. Reg. 248, Jan. 14, 1942) | 15, 24, 26 |
| 653.11 (e), (f), (g) (8 Fed. Reg. 9867) | 17 |
| 653.12 (7 Fed. Reg., Jan. 14, 1942) | 15, 20, 25 |
| 692.17 (Fed. Reg., Jan. 14, 1942) | 19 |

MISCELLANEOUS CITATION

| | |
|---|------|
| Cardozo, Benj. N., <i>The Nature of the Judicial Process</i> pp. 22-23 | 5, 6 |
|---|------|

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73



NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*



ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner's

MOTION FOR LEAVE TO FILE OUT OF TIME

**Second Petition for Rehearing
and for Recall of Mandate to Enable
this Court to Reconsider Its Judgment**

TO THE SUPREME COURT OF THE UNITED STATES:

May it please the court, Nick Falbo presents his motion for leave to file out of time a *Second Petition for Rehearing* and for a recall of the mandate so that the judgment of this court rendered and entered on January 3, 1944, can be reconsidered before jurisdiction is lost by expiration of the present term.

Intervention of the decision in *Billings v. Truesdell*.

(No. 215, Oct. Term 1943), announced March 27, 1944, construing and clarifying the Selective Service Regulations upon which the previous judgment affirming petitioner's conviction and the order denying rehearing were based, calls for exercise of the court's sound discretion in granting this motion, for reasons fully set forth in the attached *Second Petition for Rehearing*. Viewing the *Falbo* opinion in the clearer light of the *Billings* decision, it now appears that the court confused the "selective process" then in effect for combatants with that for noncombatants (conscientious objectors).

Though this error is simple in essence it is nonetheless grievous in effect. Petitioner earnestly submits that the Court's inferential holding that he had not been "accepted for service" so as to complete the "selective process" is an inadvertent misapprehension of the Regulations. Respectfully, we hasten to show that these very Regulations unmistakably fix petitioner's final acceptance for national service as being the time of his successful completion of his "final-type physical examination" that preceded issuance of the order to report for induction into camp, and which examination petitioner duly passed. The sole intent and purpose of this motion and accompanying petition is to clarify and establish this controlling point which has been misunderstood, to the end that petitioner shall not longer be wrongfully denied the judicial review and defense to which he is justly entitled.

The petition for rehearing attached hereto makes it clear that under the reasoning of the *Billings* case the administrative selective process in the *Falbo* case had been completed long prior to the issuance of the order to report for induction and that the refusal of *Falbo* to submit to induction by reporting at the camp was identical with *Billings'* refusal to be inducted into the army. Therefore the *Falbo* decision is contrary to the record in this case as well as the Regulations which definitely fix the time of accept-

ance of a conscientious objector. Either there is a direct conflict between the holdings in the *Billings* and *Falbo* cases or else one of the two opinions must be concluded to be founded in rank error. The conflict is further elucidated in the attached second petition for rehearing which is incorporated herein by reference as though copied at length herein.

The *Billings* case reasoning, this motion and the attached petition show clearly that since the judgment rendered on January 3, 1944, and the order of January 31, 1944, overruling the first motion for rehearing, there have been imported into the case elements of importance not exhibited in the briefs, the opinion and the first motion for rehearing which calls for an exercise of this court's discretion to accomplish the good ends of justice. Heretofore petitions for rehearing have been successful when they have called attention of the court to conflict of decisions arising since the former judgment or order rendered in the case. (*Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 34, 278 U. S. 587; *Roberts Sash & Door Co. v. United States*, 282 U. S. 829) Also where intervening events have imported into the case elements of importance not exhibited originally in the briefs, the opinion or a motion for rehearing. (*Oil Corporation v. Bass*, 282 U. S. 830; *Paramount Publix Corporation v. American Tri-Ergon Corporation*, 293 U. S. 528; *Duquesne Steel Foundry Co. v. Burnet*, 282 U. S. 830; *Jones v. Opelika*, 316 U. S. 584; 319 U. S. 103).

As a further ground for granting this motion it should be pointed out that since the entry of the order denying the first motion for rehearing there has been and is now presented to this court a petition for writ of certiorari in the case of *Herman H. Grieme v. United States*, filed simultaneously with this motion, in which questions are presented requiring this court to reconsider the decision rendered in this case on January 3, 1944, and which petition urges upon the court to consider whether or not there exists

a conflict in the decisions rendered in the *Billings* case and this case. The petition also urges that this court inadvertently overlooked and confused the material and vital distinction as to the time a conscientious objector is accepted with the time a man classified for the armed forces is accepted. This is analogous to *Triplett v. Lowell*, 296 U. S. 570, where the petition for rehearing was granted after questions similar to those raised in the petition had been presented to the court in another case.

The action which the court is here urged to take is similar to that taken by this court on its own motion in the case of *Martin v. Struthers*, 318 U. S. 739, where on February 1, 1943, the court vacated its judgment previously entered on October 12, 1942, and recalled its mandate and reconsidered the former judgment rendered in the case.

It should be noted that in the brief of respondent, as well as in the opinion of the court, the time of acceptance of the petitioner for work of national importance was fixed as at the time he reported at the camp, whereas in truth, in fact and in the Regulations themselves, which have the effect of an Act of Congress, the time of acceptance is fixed as at the time of the "final-type physical examination" taken by the petitioner prior to the submission to induction.

This misapprehension is probably due to the fact that this false conclusion was earnestly and eloquently urged upon the court by counsel for the respondent in his brief and at the oral argument, which centered the issue around the contention made by the court below that it was necessary to submit to induction and apply for a writ of habeas corpus as a condition precedent to judicial review. This theory of the court below, although not accepted or discussed by this court in its *Falbo* opinion, was, in the *Billings* case, definitely and expressly rejected as contrary to the Act. There it was explicitly held that a registrant need not submit to induction, but is required only to complete the

selective process so as to qualify himself for judicial review.

It must be admitted and regretted that in *this* case the Government sold to this court the conclusion that *Falbo* had not exhausted his remedies, and persuaded this court to reach an erroneous determination. The Government was traveling at such a rapid rate in urging affirmance of petitioner's conviction that it was unable to see the vital point in this case, which it was moving the court to pass by, so that the court apparently assumed it had considered that point when in fact it was not considered in the court's discussion of the Regulations and the Act.

Petitioner therefore earnestly insists that he was not only wronged and gravely injured by the judgments of the court below, but even more by the erroneous conclusion announced by this court, which has in effect driven him into the wilderness to cry for relief and to plead and replead for the administration of EQUAL JUSTICE UNDER LAW in reference to his case.

Since it is 'human to err and divine to forgive', this court has always recognized and applied the doctrine that it is possible for it to commit mistakes. Mr. Justice Cardozo well describes the nature of the judicial process in his book, *The Nature of the Judicial Process*, thus: "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. . . . The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined." (pp. 22-23) This principle was most recently applied in *Smith v. Allwright*, No. 51 October Term 1943, decided on April 3, 1944, where in the concluding part of the opinion Mr. Justice Reed said that the majority were not "unmindful of the desirability of continuity of decision in constitutional questions . . . when convinced of former error, this court

has never felt constrained to follow precedent", but that the court throughout its history had felt free to "re-examine" the issues and when convinced of error had never felt obliged to follow precedent. Mr. Chief Justice Taney reached the same conclusion in *The Passenger Cases*, 7 How. 283, 470; so also did Mr. Justice Stone in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 94; and also Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406. This principle of reconsideration of precedent and reversing former decisions found to be in error was vitalized and applied by Mr. Justice Roberts in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, reversing *Adkins v. Children's Hospital*, 261 U. S. 525; and in *Currin v. Wallace*, 306 U. S. 1, and *Mulford v. Smith*, 307 U. S. 38, reversing *United States v. Butler*, 297 U. S. 1; *Nebbia v. New York*, 291 U. S. 502, reversing *New State Ice Co. v. Liebmann*, 285 U. S. 262; *Ashton v. Cameron County District*, 298 U. S. 513; *Steward Machine Co. v. Davis*, 301 U. S. 548, and *Helvering v. Davis*, 301 U. S. 619, overturning a precedent decision of long standing.

It is neither wise nor right to cast out upon the public waters an unjust, erroneous decision and refrain from pulling it back, waiting until it washes back to the door of the court in a more increased, involved and complicated form, before reconsideration of the worth and strength of the principle announced and applied. When the proof of the error of the principle or application of the principle is discovered while within the grasp of the court in the very case in which it is announced, even upon a delayed or second motion for rehearing, it is much better than waiting ten years or ninety years before correcting the error as was done in the cases of *Smith v. Allwright*, supra, and *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, respectively. Although it is never too late to be right and better to be late in making a correction of error than never, in the field of human relations and fundamental personal rights in crim-

inal proceedings the swiftness of the judicial process is too slow to correct the mistake and cannot restore the irreparable injuries already suffered as a consequence of an unjust rule, or misapplication of an otherwise just rule.

Petitioner fully believes and appreciates the lofty attitude maintained by this court in the interest of justice—that it is much better to be right and administer equal justice under law than to blindly follow precedent; and that in its discharge of that heavy responsibility vital points of a case can escape the attention of the court. Because of this belief, and filled with a conviction that grave error has been committed in this case because of inadvertent misapprehension as to the effect of the Regulations controlling the issues involved, petitioner now moves for leave to file a second petition for rehearing. The fact that the court gave careful attention to the matter on oral argument, fully reviewed the record and briefs and read the first petition for rehearing does not prove conclusively that an error was not committed or that some vital element did not escape the court.

Judge Dillon, in his lectures on the laws and jurisprudence of England and America, declared the proper attitude of the court in matters of this kind, when he said: "Mistake, errors, fallacies and flaws elude us, in spite of ourselves, unless the case is pounded and hammered at the bar." Petitioner has pounded and hammered at the legal issues before the bar of this court to the point of fully exhausting all his legal remedies, and the time has now come for submitting to this court the responsibility of determining whether the error will be rectified or allowed to remain submerged under the mistaken assumption of the opinion that the administrative selective process had not been completed when Falbo was ordered to report.

Conclusion

Wherefore petitioner prays that this court exercise its discretion and grant him leave to file the attached "Second Petition for Rehearing" and that the mandate issued to the lower courts be recalled, and that upon consideration the petition be granted and that the order and judgment heretofore rendered be vacated. Petitioner prays for such other and further relief to which he may show himself justly entitled in the premises.

NICK FALBO, *Petitioner*

By HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing motion for leave to file the "Second Petition for Rehearing" is prepared and filed in good faith so that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner

SECOND PETITION FOR REHEARING

Comes now the petitioner, with leave of court first having been asked and obtained, and presents his second petition for rehearing, asking that the order overruling his first petition for rehearing be vacated and the judgment of affirmance theretofore entered be set aside, and shows as grounds:

That the court erred in failing to hold that petitioner had exhausted all his administrative remedies when by the local board he had been found acceptable for the authorities in control of the civilian public service camps and was accepted and assigned for duty in one of such camps by the administrative agency prior to issuance of the order to report for national service, thereby qualifying him, under the rule announced by the court, for judicial review of the illegality of his classification in defense to the indictment.

OTHER GROUNDS

By specific reference, and for sake of brevity, each and every ground assigned as error in the first petition for rehearing is incorporated herein by reference. No further discussion of the merits of those grounds need be here urged. Although petitioner still dissents from and denies the correctness of the rules of law announced in the Court's opinion of January 3, 1944, he concedes, for purposes of the discussion following, that the rulings of law are proper, and under those rulings petitioner respectfully urges the error in the application of those rules to facts, record and regulations involved in this case.

Discussion

The gist of the opinion in this case was that a registrant may not contest his classification in defense to an indictment under Section 11 of the Selective Training and Service Act unless and *until* the "selective process" has been completed. Manifestly, when the Act and Regulations had been thus construed it was the duty of this court to dispose of the case before it by making proper application of the law thus announced. Specifically, petitioner's fate hung on the narrow question of whether or not the selective process had been completed. But, singularly, the opinion of the court closed without having attempted any application of the rules of law to the facts of record or discussing whether under the regulations he had actually been accepted. Although petitioner's conviction was affirmed, it was nowhere specifically said that the selective process lacked being completed, in conformity with the rule announced, at the time of or before he was ordered to report for national service. In absence of any direct discussion of the point, it was assumed from other observations made by the court that petitioner's conviction was affirmed because he had not reported to the CPS camp and there submitted to induction in response to the order from his local board. R. 59.

But this assumption, viewed now in the light of the court's ruling and discussion in *Billings v. Truesdell* (No. 215, Oct. Term 1943, decided March 27, 1944), is shown to be incorrect; for in that case it is clearly pointed out that one *accepted* for service has exhausted his remedies under the Act and it is not necessary that he submit himself to induction in order to reach this point. *Necessarily, then, the only explanation of the affirmance of Falbo's conviction is that, in applying the rules announced, the court inadvertently based its decision on the regulations then governing acceptance and induction of men classified 1-A as eligible for the armed forces, and not the rules governing*

conscientious objectors classified IV-E for national service at CPS camps. When the doctrine announced in the *Billings* case is applied a vast difference appears between the procedure followed with reference to acceptance of men for the armed services and acceptance of men for national service at CPS camps. In fact, upon this difference the qualification of *Falbo* for judicial review properly turns, and a brief discussion thereof suffices to show that the court misapprehended the Regulations when his conviction was affirmed.

Prior to August 21, 1942, when petitioner received his order to report for national service, the procedure for inducting men classified I-A was different than it is now. At that time the final physical examination was given at the induction station immediately before the man's induction into the armed forces. If he passed the physical test he was then, as pointed out in the *Billings* case, "accepted" for the armed services, and then, in a later ceremony, he was "inducted". Under this arrangement, if a man refused to obey the order of his local board to report to the induction station for physical examination and induction, as to him the *selective process* to the point of *acceptance* remained uncompleted, because he had not submitted to final physical examination, the last requisite act of acceptance.

In the *Falbo* opinion the discussion by the court clearly indicates that his conviction was affirmed under the mistaken assumption that he had not submitted himself for this final physical examination so as to become *accepted*. But, as is shown in the next paragraph, under the procedure for acceptance and reception of each registrant classified as a conscientious objector (IV-E) *Falbo* had submitted himself to this final physical examination, and he had been accepted by the Selective Service System, the operator of the CPS camps, which acceptance took place before he was ordered to submit to induction.

The procedure followed in the case of conscientious ob-

jectors is correctly summarized in the Government's brief at page 44, where it is said:

"If the registrant is classified IV-E as a conscientious objector to both combatant and noncombatant military service the procedure for assignment to work of national importance is somewhat different. In that case, when his order number is reached in the process of selecting I-A and I-A-O registrants to report for induction into the armed forces, the registrant is summoned for a final type physical examination at the induction station in the same manner as that conducted for other selected men (Reg. 651.1-651.8). If the report of the examination indicates that he is physically and mentally qualified for service, the local board notifies the Director of Selective Service that he is acceptable for work of national importance (Reg. 651.10 (a), 652.1). The Director then assigns the registrant to a camp and upon receipt of such assignment the local board issues an order to the registrant to report for work of national importance (Reg. 652.2, 652.11; see R. 59)."

Taking judicial notice of this procedure prescribed by the Regulations, the appearance of the Government's Exhibit No. 3 (Order to Report for Work of National Importance) in the record [59] conclusively shows that Falbo had previously submitted himself for a final type physical examination at the induction station and had been found acceptable by the local board and assigned by the Director for service in a CPS camp, long before he was ordered to submit to induction.

In other words, petitioner's status at the time he received the order to report at the CPS camp was exactly the same as the status of Billings at the time he was directed to submit to induction and the same as the status of all registrants at present when they have successfully undergone the new "preinduction examination" procedure explained by this court in the *Billings* case. In that case, for the first time, the court marked with clarity the boundaries

of the "selective process", which was not fully explained in the *Falbo* case.

In the *Billings* case, by a construction of the Regulations and the Act, it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed "acceptable" and is "accepted". The very next step, induction, was not and is not a part of the *selective process*. Unmistakably, the court pointed out that the *Falbo* decision was not to be construed as holding that a man must submit to induction before he could be said to have exhausted his administrative remedies, but that the *selective process* ended when he was accepted and that thereafter he could refuse to submit to induction:

"But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report."

The foregoing quoted portion of the *Billings* opinion is a forcible demonstration of the court's misapprehension of the Regulations governing Falbo's acceptance and assignment to a CPS camp, and his status at the time he received the order to report for work at the camp. He was not indicted for failing to perform any one of the steps in the selective process, but was prosecuted and convicted for not having reported for the sole purpose of submission to induction into the CPS camp. The last step in the selective process had been completed before the order for induction had issued. He was indicted, prosecuted and convicted for refusal to submit to induction and not for failing to take the last step in the selective process.

Therefore Falbo's refusal to submit to induction for service at the camp is the only assignable reason why this

court ruled that he could not contest the legality of his classification in defense to the indictment. But under the above quoted portion of the *Billings* opinion, Falbo did not have to be "actually inducted" or submit to induction in order to raise this defense. He did not have to report to the camp, be assigned and start to work there any more than did Billings have to take the army oath, be assigned to service in the armed forces and shoulder a gun. When Falbo was found "physically and mentally qualified for general service" upon his final physical examination at the induction station *he was "acceptable for work of national importance under civilian direction."* (Italics added) (Reg. 651.31 (a) (1))¹ He had been officially and finally *accepted*, as indicated by the subsequent notice to report to camp, sent by the Director of Selective Service, who is in charge of the CPS camps. (Reg. 653) Thus Falbo exhausted his administrative remedies and, under the rules set forth in the *Falbo* opinion itself as amended and clarified by the *Billings* opinion, he was then in a position to urge the illegality of his classification as a defense against the indictment.

It can be more readily understood that petitioner had exhausted his administrative remedies when he successfully completed the final physical examination, when the rules governing registrants classified I-A as announced in the *Billings* opinion are contrasted with the situation here. Billings never received any assignment to an army camp because such assignments are not given until after the selectee actually subscribes to the oath at the induction station. But as to conscientious objectors there is no ceremony of subscribing to an oath to mark the beginning of the induction process and the end of the selective process. For this reason conscientious objectors receive their assignment to camp as a matter of course before induction and after they are

¹ 7 Fed. Register 277, Jan. 15, 1942. Eleven months after Falbo's final examination and acceptance this section was slightly amended. See Reg. 651.10 (a), July 15, 1943.

found to be acceptable. Then, later, as previously pointed out, they are merely notified to report for the purpose of submitting to induction and not for selection. The court had no difficulty in holding that when Billings had taken the physical examination he had become accepted and had exhausted his administrative remedies, and his refusal to go further did not, under the *Falbo* rule, deprive him of the right to defend his classification in court. That being true in the case of I-A men, the same rule with greater force of reason applies to those classified as conscientious objectors. Assignment of IV-E men by the Director of Selective Service to a camp is analogous to the assignment of an inductee to an army camp after actual acceptance for induction. The only difference is that in the case of IV-E men the Selective Service System never loses its jurisdiction over the assignee as it does over every I-A man inducted into the army. But that difference does not affect the analogy. In both cases, the assignment is beyond the mark of the end of the selective process and the administrative remedies and it is not necessary for the registrant to comply with an order to be inducted as a part of the "selective process." The final liability for duty and acceptance is fixed for the conscientious objector when he passes the physical examination, because he is thereupon declared acceptable for duty and service and given an assignment to camp. Even if any further physical examination were given to the assignee at the camp (as suggested by the court in footnote 7 of the *Falbo* opinion) that does not mean that those found physically unfit and rejected for service by virtue of any such examination will be discharged from service, because Section 653.11 (c) of the Regulations², which here has the force of statute, specifically provides that in such case the selectee "will be retained in the camp or hospitalized where necessary." And in Section 653.12³ it is

² 7 Fed. Reg. 248, January 14, 1942.

³ *Ibid.*

said that one who has reported to the camp must remain there until released or transferred elsewhere by proper authority. Thus, these two sections of the Regulations make it plain that 'acceptance' of the registrant for work in a camp as a conscientious objector takes place at the time he is found to be acceptable by the physician at the "final-type physical examination", for if he successfully completes the examination, he is thereafter, as a matter of course, "assigned" and then sent a notice to submit to induction at the camp for work. The language of the Regulations, and the practice of the Selective Service System thereunder, indicates that the status of the man changes from that of a "registrant" at the time he reports at the local board for induction and transportation to the camp to that of a "selectee" or "assignee". Under these considerations, it would be contrary to practice and reason to contend that the administrative process of selection had not been completed until he actually reported at the camp.

The *Falbo* decision is further clarified by the *Billings* opinion, which holds: "Moreover, it should be remembered that he who reports at the induction station [for purpose of selection] is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts." (Bracketed words added)

It might well be asked, What is the procedure outlined in the *Falbo* case, and wherein did *Falbo* fail to follow that procedure? The answer to the first part of this question is found in the *Falbo* opinion in these words: "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is *accepted* by the army, navy, or civilian public service camp." (Italics added) It is vital to ascertain, then, at what point petitioner was "accepted by the . . . civilian public service camp." On this point we are not left in doubt.

Section 651.31 (a) (1) of the Regulations states, "If in (a) of Item 65 [Report of Physical Examination and Induction (Form 221)] it is indicated that the registrant is physically and mentally qualified for general service, *he is acceptable* for work of national importance under civilian direction." (Bracketed words and italics added)

Section 652.1 (a)⁴ adds: "When a registrant in Class IV-E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction."

From these two sections of the Regulations, which have the legal force of an Act of Congress, it is seen that one classified IV-E was *finally accepted* for service when he successfully completed the final-type physical examination at the induction station. After that, routine reports were made, the ultimate result of which was that the Director of Selective Service finally sent the registrant an assignment to a certain civilian public service camp. (Reg. 652.2) Not until all this had been done was the assignee then sent the order to report for work of national importance. (Reg. 652.11, Form 50)

Applying the rules announced in the *Falbo* and *Billings* cases in the light of the plain wording of the regulations above quoted, it must be conceded that long before Falbo received the notice to submit to induction for national service, and at the time he successfully completed the final-type physical examination at the induction station, as to him the *selective process had been completed*, the government had made its choice and he had been finally accepted for service.

These facts and his acquired qualification for judicial review certainly were in no way changed by his subsequent

⁴ 7 Fed. Reg. 112, Jan. 6, 1942. Sec. 653.11 (e), (f) and (g) was not added until July 15, 1943, subsequent to this case (8 Fed. Reg. 3867).

refusal to submit to induction, go to the camp and begin actual national service. It is true that he was prosecuted for that refusal, but our whole contention is that his defense pertaining to the illegality of the classification cannot be ruled out on the erroneous assumption that the selective process had not been completed and that he had not exhausted his administrative remedies.

In such contention we are supported not only by the plain wording of Section 651.31 and 652.1 of the Regulations, and by the ruling in the *Billings* case, but also by the reasonableness of the proposition. Any other view of the matter would lead to gross injustice and amount to a rule without reason. When a registrant successfully completes his final physical examination, then nothing else remains to be done except submitting to induction and reporting to camp at the time and place specified by the Selective Service System. There are no more hearings, no more appeals, no more physical examinations. Therefore, if a construction were placed upon the Regulations and the Act requiring the assignee to actually report at the camp, or to the local board to receive transportation to the camp, as a condition precedent to his attempting to urge the illegality of his classification as a defense to the indictment, then that construction is objectionable on two grounds:

(1) It requires an assignee to do a vain and needless thing before he can avail himself of this admitted defense.

(2) It makes a trap out of the Regulations so as to inflict greater pains and penalties upon a recalcitrant assignee who defies the board by refusing to submit to induction and go to camp than are allowed by Congress in the Act to be inflicted upon one who goes to camp and there defies the agency with his physical refusal to perform work to which he is assigned. These objections deserve a separate discussion.

Officials acting for the Selective Service System at CPS camps are without authority to change any assignee's classi-

fication, or of their own motion to provide for another physical examination. All that the camp officials can do is put the assignee to work. Obviously this is no administrative remedy and an assignee reporting to the camp cannot expect to obtain any relief by going there. The situation is no better if the selectee merely goes to the local board and refuses to accept transportation to the camp.

As to Falbo, the administrative process had been completed, he had been selected, and the only other thing required of him was that he submit to induction, go to camp and begin service. To require one to perform this last step of submitting to induction as a condition to his urging his defense against the indictment is a requirement without reason, vain and needless, for once he reports to the camp as ordered there would be no reason to prosecute him, unless he sneaked out of the camp by stealth and became a "deserter". And, if he is prosecuted for leaving the camp, that is another and different charge than the one under consideration. Here we are concerned only with a charge of refusal to submit to induction.

A construction of the Act and Regulations that would require the assignee to perform the hypocritical act of going to the board merely to refuse to accept transportation to camp, or to report at camp after he had been accepted and assigned, in order to exhaust his administrative remedies is as absurd and immaterial as requiring the selectee to stand on his head, walk a tightrope, or jump in the lake before he can say that he has exhausted his administrative remedies and qualified himself for judicial review. Repeatedly this court has held that it is not necessary to comply with hollow formalisms and futile remedies before it can be said that administrative remedies have been exhausted and judicial review is available. *Utley v. St. Petersburg*, 292 U. S. 106; *Delaware & Hudson Co. v. Albany &*

³ Reg. 692.17 (Fed. Reg., Jan. 24, 1942) also provides a wide latitude for infliction of penalties upon assignees remaining at camp for violation of rules.

Susq. R. Co. (1908), 213 U.S. 435. See also *N. L. Rel. B'd v. Carlisle Lumber Co.*, 94 F. 2d 138; *N. L. Rel. B'd v. Sunshine Mining Co.*, 110 F. 2d 780. This principle was clearly expressed in *Ex parte Cohen*, 254 F. 711, a draft case arising during the first world war. There it was said, "It is true that he [Cohen] did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly." Denying Falbo the defense which he sought to urge, and thus making his conviction certain, is just as serious as the reason relied on in the *Cohen* case to make unnecessary the compliance with vain administrative procedure.

Were the Act and Regulations construed so as to require a selectee to report to a CPS camp or to his local board to obtain transportation to the camp before he could urge his defense, the requirement would be objectionable because it makes a trap out of the procedure and subjects assignees to greater pains and penalties than those provided for in the Act. Had Falbo gone to his local board and refused to accept transportation to the camp he might have encountered some serious difficulties with the officials. Had he accepted the transportation and gone on to the camp, then he would have been required to "remain therein until released" and could not voluntarily leave. (Reg. 653.11, 653.12)* The result in either case would be that he would run the risk of being subjected to additional and greater pains and penalties than those provided in Section 11 of the Act. Besides, there always lurks the ever-present issue of waiver of rights by the one who voluntarily submits to induction.

* 7 Fed. Reg. 248, Jan. 14, 1942.

These are the very considerations that led the court in the *Billings* case to rule that a registrant could not be forced by duress and violence at the induction station to submit to induction against his will. The induction process, it is true, had not been completed, but the selective process had been completed when Billings was declared physically and mentally acceptable for service in the armed forces. If that acceptance terminated the selective process in the case of a registrant liable for training and service in the armed forces where selection and induction occurred consecutively, then acceptance of a registrant classified IV-E also terminates the selective process; and the fact that in Falbo's case the selective process was terminated and separated from induction by days does not alter the fact that the administrative process had been completed for the purpose of judicial review before the order issued so as to excuse him from duty of submitting to induction.

In this conclusion we are confirmed by recent amendments to the Selective Service Regulations. As in other cases, the interpretations of an Act of Congress by those charged with its administration are entitled to persuasive weight. Part 651 (Reg. 651.1-651.10), dealing with the process of determining acceptability of conscientious objectors for national service, has been abrogated. Part 652 (Reg. 652.1-652.14), setting forth the procedure for assignment and delivery of conscientious objectors to CPS camps, has been amended to conform with the "preinduction physical examination" procedure for combatants established January 1, 1944. Under the new procedure, conscientious objectors are subject to the same preinduction-examination procedure as registrants classified for the armed services. Men liable for training and service in the armed forces are accepted by the military when they have successfully completed the physical examination, while conscientious objectors are given an assignment to a CPS camp by the

Director of Selective Service if the physical examiners find them physically and mentally acceptable for such.

This serves to emphasize petitioner's contention that the rule announced in the *Billings* case, marking the end of the selective process as the time when the registrant is found to be physically and mentally acceptable to the armed forces, applies also to the procedure for conscientious objectors. It being acceptance upon or after the physical examination that completes the selective process of the administrative agency in regard to those chosen for the armed forces, it is also acceptance upon physical examination that terminates the administrative selective process for conscientious objectors.

Even when the petitioner concedes the *Falbo* rule requiring exhaustion of the administrative remedy by submitting to the selective process in its entirety before the petitioner can become qualified for judicial review of the classification and order, he nevertheless earnestly contends that the application of that rule to the facts and record of the case has been erroneously made, and which misapplication to facts and record in the *Falbo* case makes such conclusion inconsistent with the opinions expressed in the *Billings* case.

Attention of the court is now directed to a patent error in the *Falbo* opinion. It is this error that apparently led the court to affirm the conviction. The questionable portion of that opinion reads:

"Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp."

This indicates that the court proceeded on the assumption that the equivalent of the final physical examination, which then was rendered at the induction station in the case

of those liable for combatant duty, was given to conscientious objectors at the CPS camp. Were this true, then, of course, petitioner never would have had a final-type physical examination that could form a basis for finding that he became acceptable to be inducted for national service, and the affirmance of his conviction under the rule announced might possibly have been proper. But the fact is undisputed and clear in the record, that petitioner had been subjected to the "final-type physical examination", as provided by Part 651 of the Regulations, prior to the time he was ordered to submit to induction for work at the camp. Had this not been true, then the order upon which the indictment is based never could have been issued, for such order is issued only when the registrant has been examined and found acceptable. (Reg. 652.1) The court is in manifest error when it says that the conscientious objector may be rejected at the CPS camp, because the examination under Section 651.21¹ is to be conducted by the local board examining physician, not by the camp authorities. This was overlooked by the court.

Note 7 of the court's *Falbo* opinion proves that the court was in error. Therein quotation appears of part of Section 3 (a) of the Act, to wit, "...no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined".

Acceptableness, as the controlling factor, is here again emphasized.

The inference from the court's note just quoted is that *Falbo* could not have been found acceptable until he would submit to induction and go to camp, which inference is wholly erroneous, because prior to the date of issuance of the order that he submit to induction for work at the CPS

camp he had been found acceptable, as herein previously pointed out.

Note 7 continues: "We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected." Here, perhaps more than anywhere else, the error of the court as to the procedure of acceptance prescribed by the Regulations becomes manifest. It must be remembered that when this controversy arose the process of induction for combatants differed from that for conscientious objectors. Combatants received their final examination at the induction station by the armed forces and, if found acceptable, induction followed immediately. As Note 7 shows, forty per cent of these were found to be unacceptable at the induction center and were returned to their local boards. Noteworthy and significant it is that the court does not state the percentage of non-combatants rejected by virtue of the "final-type physical examination" procedure conducted by the local board physician, which would be the proper figure to quote with the tabulated results of the final examination of combatants under Section 3 (a) of the Act. But instead of quoting this figure the court quotes the figures shown at page 56 of the Government's brief, namely the total number of registrants "rejected" at the CPS camp because of physical or mental disability. Such 'rejection' was not pursuant to Section 3 (a) of the Act as stated in Note 7. The court apparently misunderstood the Government's statement in this connection. According to that statement, the rejected 610 selectees for camps were rejected under provisions of Section 653.11 (c), which provides for rejection of those selectees who claim and indicate to camp operators that their physical condition changed subsequent to their final-type physical

examination which already had served to determine their acceptability for induction. This section does not provide for a general physical examination of all registrants reporting at the camp. Only those who assert that their condition has changed, after their acceptability for induction had been originally established, are eligible for this examination after arrival at CPS camps.

It is further significant to note that in giving these figures the Government does not say that any of these "selectees" had been *discharged* from the camps under this section of the Regulations, but it is merely said that "610, or approximately 7 percent, were *rejected*." Indeed it could not be said that the selectees had been "discharged" under this Regulation, for it is specifically provided in that very section that in event the selectee is examined at camp and found to be physically unfit for service, he will then "*be retained in the camp or hospitalized where necessary*." This also serves to emphasize petitioner's contention that his *final acceptance* took place at the time he was declared acceptable for service after he had undergone the "final-type physical examination".

Accordingly, should an assignee submit to induction and go to camp, there he cannot be simply rejected and released to go his own way. He is at that time a part of the national-service establishment, in custody of the Selective Service officials controlling the camp, and he cannot leave that camp without a specific and special order from the Director of Selective Service. Section 653.12 provides that an assignee who has reported at the camp must "remain there until released or transferred elsewhere by proper authority."

Were it true, as assumed in the opinion heretofore written in this case, that all registrants are subject to a final-type physical examination for acceptance *at the camp*, and that one who there fails to qualify for service is thereupon rejected, there might be some reason for holding that a registrant would be required to submit to this examination

at the camp before he could say that he had "exhausted his administrative remedies." But such is not the true situation. That examination *at the camp* is for one who claims, after submitting to induction and arriving at the camp, that his physical condition has changed since he underwent final-type examination before being ordered to submit to induction. *At the camp* the one examined and found unfit is "rejected" but he is definitely not discharged from the camp or released from national service. He is kept in custody at the camp. Surely that *proves* that reporting *at the camp* is no part of the administrative remedy!

Any doubt as to that view is immediately dispelled by reference to the Regulations which were in effect prior to the adoption of the amended Regulations under which this controversy arose. Section 653.5 (c), promulgated on September 25, 1941 (6 Fed. Reg. 4663), has not lost its general effect as expressing the intent of the Director of Selective Service, and the procedure therein outlined has been incorporated into provisions of the present system. This section, as it appears in Volume 3 of the Code of Federal Regulations, 1941 Supplement, page 2862, reads:

"Physical examinations by the registrant's local board will be final in so far as acceptance of men at camp is concerned, except that when conditions are reported which indicate presence of a communicable disease or a change in physical condition between the time of physical examination by the local board and the time of reporting at camp, a full report in writing will be made to the Camp Operations Division at the same time as D. S. S. Form 50 is mailed. Assignees not accepted at the camp for the reason referred to above will be retained in camp or hospitalized where necessary pending instructions from the Camp Operations Division." (Italics added)

Under Regulations in effect when petitioner was ordered to report for induction into camp,⁸ it seems plain that the

⁸ Reg. 651.31 (7 Fed. Reg. 277, Jan. 15, 1942) and 652.1-652.14 (7 Fed. Reg. 111, Jan. 6, 1942).

possibility of rejection because of a change of physical condition some time between the date of his final-type physical examination and the time he was scheduled to report at camp; does not and can not affect his right to judicial review. If he does not have a change or does not report a change of physical condition, there will be no examination and no possibility of being rejected at the camp.

Judicial review does not hinge on such chimerical uncertainties, especially when it is so plain that the regular administrative process of selection has been completed. It is utterly unreasonable that one, as a condition precedent to judicial review, should be required to appear at a camp, often hundreds, if not thousands, of miles away, when he has previously been "*finally*" examined, declared *acceptable* as a result thereof, and ordered to report for induction into national service. It is inescapable that the "selective process" ends, just as Section 651.31 (a) of the Regulations states, when the registrant has been found "acceptable" after his final-type physical examination by the local board physician. (Reg. 651.1-651.8, 7 Fed. Reg. 277, Jan. 15, 1942)

It cannot be said that Section 653.11 (c) provides any further administrative remedy any more than it can be said that the possibility of a discharge from the army is a further administrative remedy. If, during the 21-day period now in effect, the combatant inductee contracts a communicable disease rendering him unfit for service, under the ruling in the *Billings* case he would not be regarded as having failed to exhaust his administrative remedies if he should thereafter refuse to take the oath of induction. Why? Because the selective process ended when he was found acceptable by the armed forces at the first examination.

Since this is true, then it is likewise true that the remote possibility of a conscientious objector's discharge after arrival at the camp because of a change in physical condition (such as developing a severe case of cancer, being in an automobile accident, or being otherwise incapacitated)

should not cause the court to rule inconsistently that the assignee ordered to submit to induction and who refuses for good cause to do so had not exhausted his administrative remedies. The fact is that in the case of the conscientious objector the selective process ended and the administrative remedies had been completely exhausted when he was found acceptable for service at his final-type physical examination before being ordered to submit to induction.

As to this error and misapprehension of the effect of the Regulations, petitioner respectfully suggests that "it is never too late to be right." If this error is allowed to stand unchallenged, it will work untold hardship not only on petitioner, but upon the many others who now are in a similar position, and in future upon those who may be caught in similar circumstances under other administrative acts of Congress.

The court is referred to arguments appearing under Point ONE of the brief filed for petitioners in support of petitions for writs of certiorari in the cases of *Clayton v. United States* and *Stull v. United States*, which brief and petitions are filed simultaneously with this petition.

Further discussion also appears under the headings "PRELIMINARY" and "Clarification by Billings' Opinion" in another brief, supporting petitions for writs of certiorari in the companion cases of *Lohrberg v. Nicholson* and *Falbo v. Kennedy*, filed simultaneously with this second petition for rehearing. Such further discussion is here referred to and made a part hereof as though copied at length herein.

For additional grounds supporting this petition for rehearing, petitioner here refers to and incorporates herein each of the grounds asserted in each of the four petitions for writs of certiorari, filed simultaneously with this petition, in the cases of *Lohrberg v. Nicholson*, *Falbo v. Kennedy*, *Clayton v. United States*, and *Stull v. United States*.

Conclusion

Wherefore petitioner prays that the mandate issued by this Court be recalled and that the judgment theretofore entered herein affirming the judgments of the courts below, and the order overruling the first petition for rehearing, be set aside and held for naught, and that on the briefs and the first petition for rehearing heretofore filed and submitted, this second petition for rehearing be granted and the Court render an order reversing the judgments of the courts below, or, in the alternative, order reargument of this cause. Petitioner prays for such other relief to which he may show himself justly entitled in the premises.

NICK FALBO, *Petitioner*

By HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES.

No. 73.—OCTOBER TERM, 1943.

Nick Falbo, Petitioner,
vs.
The United States of America. } On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Third
Circuit.

[January 3, 1944.]

Mr. Justice BLACK delivered the opinion of the Court.

The petitioner was indicted on November 12, 1942, in a federal District Court in Pennsylvania for knowingly failing to perform a duty required of him under the Selective Training and Service Act of 1940.¹ The particular charge was that, after his local board had classified him as a conscientious objector, he wilfully failed to obey the board's order to report for assignment to work of national importance.² Admitting that his refusal to obey the order was wilful, petitioner defended his conduct on the ground that he was entitled to a statutory exemption from all forms of national service, since the facts he had presented to the board showed that he was a "regular or duly ordained" minister.³ The Act, he argued, does not make it a crime to refuse to obey an order to report for service if that order is based upon an erroneous classification, because there is no "duty" to comply

¹ 54 Stat. 885; 50 U. S. C. Appendix §§ 301-318. Section 11 imposes criminal sanctions for wilful failure or neglect to perform any duty required by the Act or by rules or regulations made pursuant to the Act.

² Under Section 5(g) of the Act, a registrant who "by reason of religious training and belief" is conscientiously opposed to participation in war may be inducted into the land or naval forces but must be assigned to noncombatant service as defined by the President. If for similar reasons a registrant is conscientiously opposed even to participation in noncombatant service he is not to be inducted into the armed forces at all but "shall . . . be assigned to work of national importance under civilian direction." Regulations, not here challenged, impose on selectees a duty to obey board orders to report for induction or assignment.

³ Section 5(d) of the Act provides in part: "Regular or duly ordained ministers of religion . . . shall be exempt from training and service (but not from registration) under this Act." The local board refused to find that petitioner was a minister and further declined to classify him as a conscientious objector. Upon review a board of appeal, set up under Section 10(a)(2), sustained the local board's refusal to exempt petitioner as a minister, but directed that he be classified as a conscientious objector.

with a mistaken order. This defense was seasonably urged but the District Court declined to recognize it, expressing the view that, "the Board has the decision of whether or not this man is to be listed as he claims he should be;" and at the conclusion of the trial the jury was charged that, "if you find from the facts that he failed to report—and there is no evidence to the contrary . . . —it would be your duty to find him guilty." The result of the trial was a conviction and sentence to imprisonment for five years.

On appeal petitioner urged that the District Court had erred in refusing to permit a trial *de novo* on the merits of his claimed exemption. In the alternative, he argued that at least the Court should have reviewed the classification order to ascertain whether the local board had been "prejudicial, unfair and arbitrary" in that it had failed to admit certain evidence which he offered, had acted on the basis of an antipathy to the religious sect of which he is a member, and had refused to classify him as a minister against the overwhelming weight of the evidence. The Circuit Court of Appeals affirmed the District Court *per curiam*, 135 F. 2d 464. We granted certiorari because of the importance of the problems involved relating to administration of the Selective Training and Service Act of 1940, upon which problems the Circuit Courts of Appeal have not expressed uniform views.⁴

When the Selective Service and Training Act was passed in September, 1940, most of the world was at war. The preamble of the Act declared it "imperative to increase and train the personnel of the armed forces of the United States." The danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood. Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required.

The mobilization system which Congress established by the Act is designed to operate as one continuous process for the selection

⁴ See, for example, *Goff v. United States*, 135 F. 2d 610, 612 (C. C. A. 4); *Rase v. United States*, 129 F. 2d 204, 207 (C. C. A. 6); *Ex parte Catanzaro*, 138 F. 2d 100, 101 (C. C. A. 3); *United States v. Kauten*, 133 F. 2d 703, 706, 707 (C. C. A. 2); *United States v. Grieme*, 128 F. 2d 811, 814, 815 (C. C. A. 3).

of men for national service. Under the system, different agencies are entrusted with different functions but the work of each is integrated with that of the others. Selection of registrants for service, and deferments or exemptions from service, are to be effected within the framework of this machinery as implemented by rules and regulations prescribed by the President.⁵ The selective service process begins with registration with a local board composed of local citizens. The registrant then supplies certain information on a questionnaire furnished by the board. On the basis of that information and, where appropriate, a physical examination, the board classifies him in accordance with standards contained in the Act and the Selective Service Regulations. It then notifies him of his classification. The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal,⁶ and thence, in certain circumstances, to the President.

Only after he has exhausted this procedure is a protesting registrant ordered to report for service. If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncom-

⁵ Section 10(a)(2) of the Act provides in part that "... local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions of claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Pursuant to the grant of authority conferred by the Act the President, through appropriate executive agencies, has promulgated and from time to time amended comprehensive Selective Service Regulations.

⁶ A registrant may not, however, appeal from the determination of his physical or mental condition. Selective Service Regulations, § 627.2(a).

batant duty may be rejected at the civilian public service camp.⁷ The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.

In this process the local board is charged in the first instance with the duty to make the classification of registrants which Congress in its complete discretion⁸ saw fit to authorize. Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded "a prompt and unhesitating obedience to or-

⁷ Section 3(a) of the Act provides in part that "... no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . ." We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected.

⁸ See *Hamilton v. Regents of the University of California*, Concurring opinion, 293 U. S. 245, 265, 266-268; see also *Jacobson v. Massachusetts*, 197 U. S. 11, 29; *MacIntosh v. United States*, 42 F. 2d 845, 847, 848; 283 U. S. 605, Dissenting opinion, 627, 632; *United States v. Bethlehem Steel Corporation*, 315 U. S. 289, 305.

ders" issued in that process "indispensable to the complete attainment of the object" of national defense. *Martin v. Mott*, 25 U. S. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made. The instant case offers a striking example of the consequences of any other view. Petitioner, 25 years of age, unmarried, and apparently in good health, registered with his local board on October 16, 1940. He claimed exemption August 23, 1941. Consideration of his claim by the local board and the board of appeal delayed his classification, so that his final order to report was not issued until September 2, 1942. Today, one year and four months after this order, he is still litigating the question.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 73.—OCTOBER TERM, 1943.

Nick Falbo, Petitioner, } On Certiorari to the United States
vs. } Circuit Court of Appeals for the
United States of America. } Third Circuit.

[January 3, 1944.]

Mr. Justice RUTLEDGE, concurring.

I concur in the result and in the opinion of the Court except in one respect. Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order. And there is nothing to show that the appeal board acted otherwise than according to law. If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the appeal board's action. Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question. Accordingly I agree that the conviction must be sustained.

SUPREME COURT OF THE UNITED STATES.

No. 73.—OCTOBER TERM, 1943.

Nick Falbo, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Third
Circuit.

[January 3, 1944.]

Mr. Justice MURPHY, dissenting.

This case presents another aspect of the perplexing problem of reconciling basic principles of justice with military needs in wartime. Individual rights have been recognized by our jurisprudence only after long and costly struggles. They should not be struck down by anything less than the gravest necessity. We assent to their temporary suspension only to the extent that they constitute a clear and present danger to the effective prosecution of the war and only as a means of preserving those rights undiminished for ourselves and future generations. Before giving such an assent, therefore, we should be convinced of the existence of a reasonable necessity and be satisfied that the suspension is in accordance with the legislative intention.

The immediate issue is whether the Selective Training and Service Act of 1940 must be interpreted so as to deprive alleged violators of the right to a full hearing and of the right to present every reasonable defense. Petitioner, a member of Jehovah's Witnesses, claimed to be a minister exempt from both military training and civilian work under the Act. After exhausting all the administrative remedies and appeals afforded by the Act, he was classified as a conscientious objector (Class IV-E) rather than as a minister (Class IV-D). Petitioner alleges that this classification was contrary to law and was the result of arbitrary action by his local board. On the assumption that these allegations are true, the subsequent order to report for assignment to work of national importance, which he disobeyed, must therefore be considered invalid. Our problem is simply whether petitioner can introduce evidence to that effect as a defense to a criminal prosecution for failure to obey the order.

Common sense and justice dictate that a citizen accused of a crime should have the fullest hearing possible, plus the opportunity to present every reasonable defense. Only an unenlightened jurisprudence condemns an individual without according him those rights. Such a denial is especially oppressive where a full hearing might disclose that the administrative action underlying the prosecution is the product of excess wartime emotions. Experience demonstrates that in time of war individual liberties cannot always be entrusted safely to uncontrolled administrative discretion. Illustrative of this proposition is the remark attributed to one of the members of petitioner's local board to the effect that "I do not have any damned use for Jehovah's Witnesses." The presumption against foreclosing the defense of illegal and arbitrary administrative action is therefore strong. Only the clearest statutory language or an unmistakable threat to the public safety can justify a court in shutting the door to such a defense. Because I am convinced that neither the Selective Training and Service Act of 1940 nor the war effort compels the result reached by the majority of this Court, I am forced to dissent.

It is evident that there is no explicit provision in the Act permitting the raising of this particular defense and that the legislative history is silent on the matter. Suffice it to say, however, that nothing in the statute or in its legislative record proscribes this defense or warrants the conviction of petitioner without benefit of a full hearing. Judicial protection of an individual against arbitrary and illegal administrative action does not depend upon the presence or absence of express statutory authorization. The power to administer complete justice and to consider all reasonable pleas and defenses must be presumed in the absence of legislation to the contrary.¹

Moreover, the structure of the Act is entirely consistent with judicial review of induction orders in criminal proceedings. As the majority states, the Act is designed "to operate as one continuous process for the selection of men for national service," and it is desirable that this process be free from "litigious interruption." But we are faced here with a complete and permanent

¹ Otherwise the absence of clear statutory permission would preclude court review of induction orders in habeas corpus proceedings following actual induction, a result which this Court's opinion presumably does not intend to infer. Judicial review in such proceedings has become well settled in lower federal courts.

interruption springing not from any affirmative judicial intervention but from a failure to obey an order. A criminal proceeding before a court is therefore inevitable and the only problem is the availability of a particular defense in that proceeding. Hence judicial review at this stage has none of the elements of a "litigious interruption" of the administrative process.

No other barriers to judicial review of the induction order in a criminal proceeding are revealed by the structure of the Act. The "continuous process" of selection is unique, unlike any ordinary administrative proceeding. Normal concepts of administrative law are foreign to this setting. Thus rules preventing judicial review of interlocutory administrative orders and requiring exhaustion of the administrative process have no application here. Those rules are based upon the unnecessary inconvenience which the administrative agency would suffer if its proceedings were interrupted by premature judicial intervention. But since the administrative process has already come to a final ending, the reason for applying such rules no longer exists. And even if the order in this case were considered interlocutory rather than final, which is highly questionable, judicial review at this point is no less necessary. Criminal punishment for disobedience of an arbitrary and invalid order is objectionable regardless of whether the order be interlocutory or final.

Nor do familiar doctrines of the exclusiveness of statutory remedies have any relevance here. Had Congress created a statutory judicial review procedure prior to or following induction, the failure to take advantage of such a review or the judicial approval of the induction order upon appeal might bar a collateral attack on the order in a criminal proceeding. But Congress has erected no such system of judicial review. Courts are left to their own devices in fashioning whatever review they deem just and necessary.

Thus there is no express or implied barrier to the raising of this defense or to the granting of a full judicial review of induction orders in criminal proceedings. Courts have not hesitated to make such review available in habeas corpus proceedings following induction despite the absence of express statutory authorization. Where, as here, induction will never occur and the habeas corpus procedure is unavailable, judicial review in a criminal proceeding becomes imperative if petitioner is to be given any

protection against arbitrary and invalid administrative action.² It is significant that in analogous situations in the past, although without passing upon the precise issue, we have supplied such a necessary review in criminal proceedings. Cf. *Union Bridge Co. v. United States*, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 California L. Rev. 129, 165, 166. See also *Fire Department of City of New York v. Gilmour*, 149 N. Y. 453, 44 N. E. 177; *People v. McCoy*, 125 Ill. 289, 17 N. E. 786.

Finally, the effective prosecution of the war in no way demands that petitioner be denied a full hearing in this case. We are concerned with a speedy and effective mobilization of armed forces. But that mobilization is neither impeded nor augmented by the availability of judicial review of local board orders in criminal proceedings. In the rare case where the accused person can prove the arbitrary and illegal nature of the administrative action, the induction order should never have been issued and the armed forces are deprived of no one who should have been inducted. And where the defendant is unable to prove such a defense or where, pursuant to this Court's opinion, he is forbidden even to assert this defense, the prison rather than the Army or Navy is the recipient of his presence. Thus the military strength of this nation gains naught by the denial of judicial review in this instance.

To say that the availability of such a review would encourage disobedience of induction orders, or that denial of a review would have a deterrent effect, is neither demonstrable nor realistic. There is no evidence that petitioner failed to obey the local board order because of a belief that he could secure a judicial reversal of the order and thus escape the duty to defend his country. Those who seek such a review are invariably those whose conscientious or religious scruples would prevent them from reporting

² Judge Robert C. Bell of the federal district court in Minnesota, in his article "Selective Service and the Courts," 28 A. B. A. Journal 164, 167, states, "The courts are likely to be confronted with the question of what can be presented as a defense by a selectee in a criminal prosecution against him for a violation of the provisions of the Act of 1940. It appears that this question has not been decided. On principle, it would seem that the defendant should be permitted to offer as a defense the same questions that he could present in a habeas corpus proceeding, that is, the question of whether the board had jurisdiction, whether there was a fair hearing, or whether the action of the board was arbitrary or unlawful."

for induction regardless of the availability of this defense. And I am not aware that disobedience has multiplied in the Fourth Circuit, where this defense has been allowed. *Barley v. United States*, 134 F. 2d 998; *Goff v. United States*, 135 F. 2d 610. Moreover, English courts under identical circumstances during the last war unhesitatingly provided a full hearing and reviewed orders to report for permanent service. *Offord v. Hiscock*, 86 L. J. K. B. 941; *Hawkes v. Moxey*, 86 L. J. K. B. 1530. Yet that did not noticeably impede the efficiency or speed of England's mustering of an adequate military force.

That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system. Especially is this so where neither public necessity nor rule of law or statute leads inexorably to such a harsh result. The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case.